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JO I
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Vol. 1
(1591)

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

RAPPORTS

JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE, JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

TOME I

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INTRODUCTION.

Nous commençons aujourd'hui la publication des *Rapports judiciaires revisés de la Province de Québec.*

Cet ouvrage contiendra une revision complète de toutes les causes rapportées jusqu'au 1er janvier 1892, date où commenceront les rapports officiels que le Barreau de la Province de Québec doit publier, avec certaines annotations, référant, autant que possible, aux lois actuelles auxquelles ces causes s'appliquent. Nous avons le soin de mettre à la suite les jugements rendus par les divers tribunaux dans la même cause ; de sorte qu'on ne sera pas tenu, comme aujourd'hui, d'avoir recours à plusieurs ouvrages, pour trouver le rapport complet des différents jugements qui ont été rendus sur une instance. Dans les volumes qui vont suivre, nous référerons aussi à toutes décisions antérieures qui ont été rendues sur les mêmes questions. L'utilité de la publication de ces rapports est évidente. Il est aujourd'hui très dificile de se procurer tous les rapports judiciaires des causes jugées dans la province ou au Conseil privé, et le coût de ces rapports est très élevé. Il faut aussi faire certaines recherches, pour constater si le jugement d'une cause rapportée n'a pas été renversé par un tribunal supérieur. Nous revisons ces rapports, mais nous n'en élaguons que ce qui est absolument inutile. Nous calculons que notre travail pourra se faire dans vingt à vingt-cinq volumes, et nous nous proposons d'en publier au moins quatre par année.

Comme nous devons rapporter les décisions des différents tribunaux qui ont existé dans le pays, nous croyons qu'il est utile d'indiquer sommairement la date de leur création et leur organisation.

En avril 1663, Louis XIV, roi de France, rendit un édit créant le Conseil supérieur de Québec. Ce Conseil souverain devait siéger, et siégea en la ville de Québec. Il fut d'abord composé du gouverneur, représentant le roi, et de l'évêque ou du premier ecclésiastique de la province, et de cinq autres nommés et choisis, conjointement et de concert, par le gouverneur et l'évêque ou le premier ecclésiastique, et d'un procureur du roi. Le roi donna et attribua à ce Conseil "le pouvoir de connaître de toutes causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les lois et ordonnances de notre royaume, et y procéder, autant qu'il se pourra, en la forme et manière qui se pratique et qui se garde dans le ressort de notre cour de parlement de Paris, nous réservant néanmoins, selon notre pouvoir souverain, de changer, réformer et amplifier les dites lois et ordonnances, d'y déroger, de les abolir, d'en faire de nouvelles ou tels règlements, statuts et constitutions que nous verrons être plus utiles à notre service et au bien de nos sujets du dit pays." Cet édit donne, en outre, au Conseil le pouvoir de commettre à Québec, à Montréal, aux Trois-Rivières et en tous autres lieux "des personnes qui jugent en première instance, sans chicane et longueur de procédure des différents procès qui pourront survenir entre les particuliers." Par une déclaration du 5 juin 1675, confirmant l'édit créant le Conseil souverain de Québec, Louis XIV ordonna que le Conseil fût à toujours composé du gouverneur ou lieutenant général, de l'évêque de Québec, ou, en son absence, de son vicaire, de l'intendant de justice, police et finance, et de sept conseillers, du procureur général du roi pour la Nouvelle-France, et d'un greffier.

Le Conseil siégeait tous les lundis, au palais de l'intendant. Ce tribunal ne jugeait qu'en appel. Il eut, cependant, une juridiction de première instance, depuis décembre 1664 à mai 1677. Dans le mois de mai 1664, Louis XIV, en établissant la compagnie des Indes occidentales, érigea Québec en prévosté,

et y introduisit la Coutume de Paris. Par l'édit du mois de décembre 1674, portant l'union au domaine du roi de toutes les terres par lui accordées à la compagnie des Indes occidentales, Louis XIV révoqua le premier degré de juridiction ou siège de la Prévosté et justice ordinaire de Québec, et ordonna que le Conseil souverain jugerait en première instance les procès et contestations dont la Prévosté avait coutume de connaître, et dont l'appel était relevé au Conseil souverain ; mais, par l'édit du mois de mai 1677, il créa et institua de nouveau le siège de la Prévosté et justice ordinaire de Québec, "pour connaître en première instance de toutes matières tant civiles et criminelles et dont l'appel sera relevé en notre Conseil souverain établi en la dite ville." Le siège de la Prévosté de Québec, par cet édit, était composé d'un lieutenant général, d'un procureur du roi, et un greffier. Ce tribunal exista jusqu'à la cession du pays à l'Angleterre.

Par l'édit du 12 janvier 1717, Louis XIV érigea une cour d'Amirauté dont le juge portait aussi le nom de lieutenant général.

Les justices ordinaires et subalternes de Montréal et des Trois-Rivières, distinguées par le nom de juridictions royales étaient des cours civiles et criminelles organisées de la même manière que celle de la Prévosté, excepté qu'il n'y avait point de lieutenant particulier aux Trois-Rivières. Toutes ces cours tenaient audience deux fois par semaine, outre les audiences extraordinaires. L'intendant, comme chef de justice et de la police, tenait aussi une cour pour les affaires civiles, criminelles et de police. Il prenait connaissance de toutes les matières qui concernaient le roi ou les difficultés qui s'élevaient entre le seigneur et le censitaire. Il y avait appel de ses arrêts, comme de ceux du Conseil souverain, au Conseil d'Etat à Paris.

Tel est le système judiciaire qui a existé en ce pays jusqu'en 1760.

Après que le Canada fut passé sous la puissance de l'Angleterre, et, pendant plusieurs années de la domination nouvelle, l'administration judiciaire fut complètement désorganisée, et la période qui s'écoula depuis 1760 jusqu'en 1764, est ce que l'on appelle le règne militaire.

Après la cession, le gouverneur Amherst divisa le Canada en trois gouvernements distincts, savoir : Québec, Montréal et Trois-Rivières. Il mit le gouverneur Murray à la tête du premier. Il nomma le brigadier Thomas Gage gouverneur de Montréal, et le colonel Ralph. Burton gouverneur ou commandant aux Trois-Rivières ; leur laissant le soin d'établir des cours ou tribunaux pour l'administration de la justice, dans leurs districts respectifs.

Par la proclamation royale du 7 octobre 1763, le roi George III donna au gouvernement le pouvoir d'ériger et constituer des cours de judicature et de justice publiques dans la colonie, pour entendre et déterminer toutes les causes tant civiles que criminelles suivant la loi et l'équité, et autant que faire se pourra, conformément aux lois d'Angleterre, avec droit d'appel au Conseil privé.

Par l'ordonnance du 17 septembre 1764, le gouverneur général Murray créa une cour supérieure de justice, ou cour du Banc du Roi, qui devait siéger à Québec deux fois par an. Cette cour devait juger conformément aux lois d'Angleterre, et aux ordonnances de la province, et on pouvait appeler au gouverneur et au Conseil quand l'affaire en litige était au-dessus de la valeur de trois cents livres sterling, et du gouverneur et du Conseil, on pouvait appeler au roi et au Conseil, quand l'affaire en litige était de la valeur de cinq cents livres sterling. Il établit aussi une cour de justice inférieure, ou de plaidoyers communs, avec pouvoir de décider sur toutes les causes de propriété dont la valeur serait au-dessus de dix livres sterling, avec permission aux parties, d'en appeler à la Cour

Supérieure ou Cour du Banc du Roi, quand l'affaire en litige sera de la valeur de vingt livres et au-dessus.

Tous les procès dans cette cour devaient être par jurés, si l'une ou l'autre des parties le demandait. Elle siégeait à Québec en même temps que la Cour Supérieure ou Cour du Banc du Roi. Quand l'affaire en litige dans cette cour était au-dessus de la valeur de deux cents livres sterling, il y avait appel au gouverneur et au Conseil, et du gouverneur et du Conseil on pouvait appeler au Roi et au Conseil, quand l'affaire en litige était de la valeur de cinq cents livres sterling, et au-dessus. Les juges de cette cour devaient décider selon l'équité, ayant égard pourtant aux lois d'Angleterre.

Ce système de judicature organisé en 1764, continua d'exister sans changement jusqu'en 1774. Cette année fut passé le statut impérial, 14 George III, ch. LXXXIII, appelé " l'Acte de Québec."

La section 8 de ce statut dit que, dans toutes les affaires en litige qui concerneront les propriétés et les droits de citoyens des sujets canadiens dans la province, on aurait recours aux lois du Canada. La section 11 ordonne cependant que les lois criminelles anglaises continueront à s'appliquer à la province.

Le gouverneur Carleton par l'ordonnance de 1777, 17 George III, ch. I, établit : 1° une cour du Banc du Roi pour les causes criminelles seulement, et où le juge en chef pouvait seul présider ; 2° une cour des Plaidoyers communs pour chacun des districts de Québec, de Montréal où trois juges devaient siéger, mais où la présence de deux était suffisante ; 3° une cour de prérogative ou de vérification (*probates*), pour les affaires testamentaires ou de succession, et 4° une cour d'Appel que devait former le gouverneur, le lieutenant-gouverneur, le juge en chef de la province et des conseillers exécutifs au nombre de cinq au moins. Ces tribunaux durèrent jusqu'en 1793. L'acte de judicature de 1793 divisa la province en trois dis-

tricts, ceux de Québec, de Montréal et des Trois-Rivières, et établit des cours du Banc du Roi dans les deux premiers.

Celle de Québec se composait d'un juge en chef de la province et de trois juges puînés, et celle de Montréal d'un juge en chef de la dite cour, et de trois juges puînés. La juridiction de cette cour embrassait toutes les matières, tant civiles que criminelles, en exceptant toutefois celle de juridiction d'amirauté.

Pour le district des Trois-Rivières, deux juges du Banc du Roi des districts de Québec et de Montréal, et le juge provincial nommé pour le district des Trois-Rivières tenait deux termes supérieurs du Banc du Roi pour la décision des causes civiles et criminelles.

Ce statut organisa de nouveau la cour provinciale d'Appel, ou le tribunal supérieur de juridiction civile, qui fut composé du gouverneur, du lieutenant-gouverneur ou de la personne administrant le gouvernement, des membres du Conseil Exécutif, de juge en chef de la province et du juge en chef du district de Montréal, ou cinq d'entre eux.. Cette cour d'Appel prenait connaissance de toute affaire où la chose en litige excédait vingt livres sterling, et sa juridiction était finale dans les affaires au-dessous de cinq cents livres. Dans les affaires excédant cette somme il y avait appel à Sa Majesté en conseil.

A part ces dispositions il fut encore établi par cet acte des cours de circuit, tenues deux fois l'année dans certaines localités des trois districts de Québec, Montréal, et des Trois-Rivières, par un juge du Banc du Roi. Ces cours de Circuit avaient une juridiction concurrente avec les termes inférieurs établis dans les villes pour la décision des matières civiles au-dessous de dix livres sterling.

Le district de Gaspé fut établi par le statut, 34 George III, ch. VI, et une cour provinciale ayant juridiction jusqu'à vingt livres sterling y fut organisée. Plus tard cette

juridiction fut étendue à 100 livres sterling. Le district de St-François fut constitué en district inférieur en 1823 par le statut 3 George IV, ch. XVII, avec une cour provinciale dont la juridiction fut d'abord de vingt livres sterling. Mais en 1830, par la 10e et 11e George IV, ch. XVI, il y fut établi une cour du Banc du Roi que devait composer le juge provincial et le juge résidant des Trois-Rivières et un juge de Québec et de Montréal. Cette cour avait les mêmes pouvoirs que la cour du Banc du Roi des autres districts.

En 1821 la Législature passa un acte pour la décision sommaire des petites causes. Cet acte établissait des cours de commissaires ayant juridiction jusqu'à $25 et qui décidaient d'une manière sommaire sans appel. Suspendues et renouvelées plusieurs fois, ces cours furent en 1839, par la deuxième Victoria, ch. LVIII, remplacées par des cours de requêtes, qui avaient juridiction dans les campagnes jusqu'à dix livres sterling, concurremment avec les cours de circuit.

Aux cours de requêtes succédèrent des cours de district et de division qui furent créées par un acte du Parlement du Canada, 4 et 5 Victoria, ch. XX. Sous l'autorité de ce statut, le 5 décembre 1841, le gouverneur émana une proclamation établissant vingt-deux districts inférieurs et nommant quatre juges de circuit pour le district de Montréal et trois pour le district de Québec; les juges des districts des Trois-Rivières et de St-François agissaient *ex officio* comme juges de district, où la juridiction des cours de district s'élevait jusqu'à vingt livres sterling, et celle des cours de division à six livres cinq schellings.

Par les statuts du Canada de 1843, 7 Victoria, ch. XVI-XVIII et XIX, les cours de district et de division furent abolies et des cours de circuit furent établies. Ces cours de circuit étaient composées du juge en chef et des juges puînés du Banc de la Reine et des juges de circuit. Ils avaient la même juridiction que les cours inférieures du Banc du Roi jusqu'à vingt livres

courant. Il y avait appel au Banc de la Reine dans les affaires au-dessus de dix livres. Par le chapitre XVIII des statuts 7 Victoria, on établit une cour d'appel qui se compose de tous les juges de cours du Banc de la Reine dans le Bas-Canada. Elle possédait les mêmes pouvoirs que la ci-devant Cour d'Appel.

Par la section 2 du chapitre XXXVIII des Statuts du Canada, 1849, 12 Victoria, la Cour du Banc de la Reine fut abolie, et la Cour Supérieure fut créée ayant juridiction dans toutes les causes, à l'exception de celles qui appartenaient exclusivement à l'amirauté et celle qui fut conférée à la Cour de Circuit. Par la section 42, la Cour de Circuit fut organisée, et par la section 47 on lui accorda juridiction exclusive dans les affaires n'excédant pas cinquante louis courant.

Par la section 1 du chapitre XXXVII des Statuts du Canada de 1849, 12 Victoria, la Cour d'Appel qui avait été constituée par le statut 7 Victoria, fut abolie et une nouvelle cour d'appel fut organisée sous le nom de la Cour du Banc de la Reine.

Aujourd'hui, comme le constate l'article 2289 des Statuts refondus de Québec, les tribunaux de la province en matière civile, criminelle et mixte, sont les suivants :

1. La Cour du Banc de la Reine, divisée en cour criminelle et en cour civile d'appel ;
2. La Cour Supérieure ;
3. La Cour de Circuit ;
4. La Cour des Commissaires ;
5. La Cour des Magistrats de district ;
6. La Cour des Sessions de la paix ;
7. Le Tribunal des Juges de paix ;
8. La Cour du Recorder ;
9. La Cour de Vice-Amirauté.

Nous avons, en outre, la Cour de l'Echiquier, et la Cour Suprême du Canada, qui ont été créées et organisées par le Parlement du Canada, sous les dispositions de la section 101 de l'*Acte de l'Amérique britannique du Nord de 1867.*

Le plus haut tribunal auquel on puisse maintenant recourir est Sa Majesté en son Conseil privé.

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ABRÉVIATIONS.

I rév :—Extraits ou précédents tirés des registres de la Prévosté de Québec, de certaines sentences du temps de Messieurs *Déleigne* et *Dain*, deux des plus éminents lieutenants civils et criminels de la dite Prévosté sous le gouvernement français, depuis 1726 jusqu'en 1756, par JOSEPH FRANÇOIS PERRAULT, un des greffiers et protonotaires de la Cour civile du Banc du Roi pour le district de Québec.

Con. S :—Extraits ou précédents des arrêts tirés des registres du Conseil supérieur de Québec, depuis le 28 avril 1727, jusqu'au 1er mai 1759, par JOSEPH FRANÇOIS PERRAULT, un des greffiers et protonotaires de la Cour civile du Banc du Roi pour le district de Québec.

R. de L. :—Revue de Législation et de Jurisprudence et collection des divers tribunaux du Bas-Canada, publiés en trois volumes, par LOUIS O. LETOURNEUX, S. LELIÈVRE et F. RÉAL ANGERS, avocats.

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RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

RUMB DE VENT DE CONCESSION.

PRÉVOSTÉ DE QUÉBEC, 22 octobre 1726.

NOEL PELTIER, habitant de Neuville, Demandeur, et PIERRE PELTIER, du dit lieu, Défendeur, et PIERRE MAGUÉ, Partie intervenante, et le SIEUR DEMELOISES, Seigneur de Neuville.

Sentence qui confirme le rumb de vent de la 2me concession de Neuville quoiqu'il ne fût pas conforme à celui du 1er rang des concessions.

Nous ordonnons que le premier rumb de vent, courant ouest sud-ouest, cinq degrés ouest, qui a été donné aux habitants, et sur lequel ils ont conformé leurs travaux, depuis près de trente ans, doit subsister; et, au cas qu'ils se soient un peu écartés de la dite ligne, ou rumb de vent, et qu'ils ayent travaillé les uns sur les autres, nous les renvoyons au règlement fait par le Conseil:

Dépens compensés. (*Prév.*, p. 7.)

Noël Peltier a appelé de cette sentence au Conseil Supérieur, et, le 28 avril, 1727, le Conseil Supérieur a infirmé cette sentence, par l'arrêt suivant:

Le Conseil a mis, et met l'appellation et sentence dont est appel au néant, émendant, ordonne que les habitants du village de St-Jean jouiront et suivront les rumbs de vent portés par leurs contrats de concessions, savoir, nord-est et sud-ouest, pour la profondeur, sur la route appelée St-Jean, comme elle leur a été donnée par leurs dits contrats, à l'effet de quoi, le dit sieur Demeloises sera tenu de faire donner, à ses frais, et sans tirer à conséquence, à chacun des dits habitants le rumb de vent porté par le contrat du dit Pierre Peltier, au moins dans la profondeur d'un arpent, pour rendre certains, à toujours, les dits rumbs de vent entre tous, et sans qu'aucuns des dits habitants puissent se demander entre eux aucun dédommagement du terrain et désert des uns sur les autres. (*Con. S.*, p. 7.)

VANIER LIBRARY

PREUVE.—NOTAIRE.—PRODUCTION DE MINUTE.

PRÉVOSTÉ DE QUÉBEC, 22 octobre 1726.

CHARLES LECLERC, Demandeur, et PIERRE LABRIE, Défendeur

Sentence qui ordonne à un Notaire de produire deux minutes en cour.

Nous ordonnons, avant faire droit, que Mtre L. Pichet, notaire, qui a passé les contrats des parties, comparaîtra en personne, avec P. Pichet, un témoin, dont est fait mention dans les contrats présentés, et apportera les minutes des dits deux contrats, et ce, dans huitaine : dépens réservés. (*Prév.*, p. 7.)

FEMME MARIEE.—BILLET.

PRÉVOSTÉ DE QUÉBEC, 11 juillet 1727.

NICOLAS JÉRÉMIE, marchand, Demandeur, et URBAIN BELLORGET, Défendeur.

Sentence qui décharge un mari de payer le billet de sa femme (1), vu qu'il ne l'avait autorisé à contracter aucune dette, et qu'il ne reconnaissait pas son billet. (*Prév.*, p. 8.)

PREUVE.—BILLET PERDU.

PRÉVOSTÉ DE QUÉBEC, 23 décembre 1727.

JEANNE TRÉPAGNY, fille et procuratrice d'ANDRÉ BOUCHARD, son beau-père, absent de ce pays, Demanderesse, et PIERRE RUETTE DAUTEUIL, Défendeur.

Sentence sur billet perdu. (2)

Après avoir requis du Défendeur le serment, s'il doit la somme de vingt-deux livres, suivant le billet qu'il en a fait au dit *Bouchard*, et, ayant refusé de le faire, d'office, nous l'avons condamné et condamnons à payer la dite somme de vingt-deux livres à la demanderesse, au dit nom (3) ; au moyen de quoi, et de la présente sentence, le dit billet demeurera nul, en cas qu'il se retrouve. (*Prév.*, p. 9.)

---

(1) L'article 1280 C. C. dit que la dette contractée par la femme, du consentement du mari, est à la charge de la communauté.

(2) L'article 1233 C. C. dit que la preuve testimoniale est admise, dans les cas où la preuve écrite a été perdue par cas imprévu.

(3) L'article 19 C. P. C. dit que personne ne peut plaider avec le nom d'autrui.

PROPRIETE.—DOMMAGE.

PRÉVOSTÉ DE QUÉBEC, 24 février 1728.

JOSEPH AINS, Demandeur, et GUILLAUME DEGUISE, Défendeur.

Sentence qui adjuge au Demandeur le bois coupé sur sa terre. (1)

Nous faisons défense au Défendeur d'enlever, directement ou indirectement, le bois qu'il a fait bûcher sur la terre du Demandeur, lequel bois demeurera au Demandeur comme à lui appartenant; lui faisons en outre défense de récidiver à l'avenir, sous les peines portées par l'ordonnance de monsieur l'Intendant à ce sujet. (*Prév.*, p. 9.)

SEMINAIRE DE QUEBEC.—EDUCATION.

PRÉVOSTÉ DE QUÉBEC, 11 mars 1728.

JEAN FRS HAZEUR, et autres neveux et héritiers de feu Messire Soumande, prêtre, chanoine, Demandeurs, et MESSIRE LION, de St-Féréol, prêtre et supérieur du séminaire de Québec, Défendeur.

Sentence qui condamne le Supérieur du Séminaire de Québec à garder le fils du Demandeur.

Vu l'acte de fondation, nous condamnons le dit *sieur Lion*, au dit nom de supérieur du Séminaire, (2) à garder le fils du Demandeur au dit Séminaire pour y achever ses études jusqu'à l'état ecclésiastique exclusivement; si mieux il n'aime lui payer, pour sa pension annuelle, ailleurs, la somme de quatre cent cinquante livres, suivant le dit acte de fondation; condamnons, en outre, le dit *sieur Lion*, au dit nom, à recevoir dorénavant, et à perpétuité, au dit Séminaire, les enfants que les héritiers présenteront de la famille du dit feu Soumande, au nombre de deux préférablement à tous autres, étant l'intention du dit acte de fondation, fait par le dit sieur Soumande. (3) (*Prév.*, p. 9.)

REVENDICATION.—GARDIEN JUDICIAIRE.

PRÉVOSTÉ DE QUÉBEC, 11 mars 1728.

Entre la VEUVE VOYER, Demanderesse, et PIERRE PICHET, gardien des effets saisis sur FRANÇOIS TRÉPAGNY, Défendeur.

(1) Voir articles 434 et 442 C. C.

(2) L'article 19 C. P. C. dit que personne ne peut plaider avec le nom d'autrui.

(3) Le tribunal paraît avoir considéré que les demandeurs avaient un intérêt suffisant pour obtenir une condamnation en faveur de leurs héritiers, à perpétuité. V. l'article 13 C. P. C.

Sentence donnant main-levée des effets saisis appartenant à la Demanderesse, et ordre de vendre le surplus, et d'en donner le produit à la demanderesse, déduction faite des frais de justice et de garde. (1)

Vu le procès-verbal de saisie, et l'arrêt du Conseil, nous condamnons le Défendeur, à remettre à la Demanderesse, tous les meubles qui lui appartiennent, mentionnés au procès-verbal de saisie faite sur Frs Trépagny, et que le surplus des effets saisis appartenant au dit Trépagny, qui sont aussi mentionnés au dit procès-verbal de saisie, seront vendus, en la manière accoutumée, pour les deniers en provenant être remis à la Demanderesse, jusqu'à concurrence de deux cents livres, pour loyer que le dit Trépagny lui devait, sans préjudice à la Demanderesse de ses autres droits et prétentions qu'elle a contre le dit Trépagny ; ordonnons que les frais de justice et de garde seront payés par préférence, sur le produit des dits effets saisis, et ce sur le mémoire qui nous sera présenté, et par nous réglé. (*Prév.*, p. 10.)

LOUAGE.—LOCATAIRE.

PRÉVOSTÉ DE QUÉBEC, 13 avril 1728.

PIERRE LÉGER, faiseur de galoches, Demandeur, et PIERRE MONFILS, Défendeur.

Sentence qui condamne un locataire à garnir les appartements loués, et à vider les lieux, en cas de plainte de bruit par rapport à sa profession (2).

Nous, conformément au bail passé entre les parties, avons ordonné qu'il sera exécuté, en mettant, par le Demandeur, dans la chambre, des meubles suffisants pour la sûreté du loyer de la dite chambre et grenier, à condition toutefois, que s'il y a des plaintes de bruit que le dit Léger pourra faire par rapport à sa profession, il sera obligé de vider les lieux. (*Prév.*, p. 11.)

Pierre Léger et sa femme ont appelé de ce jugement au Conseil Supérieur, et le Conseil a, le 9 août 1728, confirmé le jugement de la Prévosté par l'arrêt suivant :

Le Conseil a mis et met l'appellation au néant, ordonne que la sentence dont est appel sortira son plein et entier effet, sauf par le Conseil à faire droit, au cas qu'il soit porté quelque plainte du bruit que le dit Léger pourrait faire à l'occasion de sa profession. (*Con. S.*, p. 10.)

(1) Sous l'article 582 C. P. C., celui qui veut revendiquer des effets saisis, procède maintenant par opposition.

(2) V. article 1624 C. C.

PAIN BENIT.—EGLISE.

PRÉVOSTÉ DE QUÉBEC, 6 juillet 1728.

GABRIEL BOUTIN, marguillier en charge de la paroisse de l'Ancienne Lorette, Demandeur, et LOUIS RIOPEL, habitant du dit lieu, Défendeur.

Sentence qui condamne à faire et présenter le pain bénit, à fournir un cierge et une quêteuse.

Nous condamnons le Défendeur à faire et présenter le pain bénit, au premier jour de dimanche, étant son tour de le rendre, ensemble de fournir un cierge, suivant sa dévotion, du prix du moins de cinq sols, et de donner une quêteuse, pour quêter ce jour-là dans l'église, à peine de dix livres d'amende, applicable à la fabrique de la dite église. (*Prév.*, p. 12.)

MARGUILLIERS.—FABRIQUE.

PRÉVOSTÉ DE QUÉBEC, 6 juillet 1726.

GABRIEL BOUTIN, marguillier en charge de la paroisse de l'Ancienne-Lorette, Demandeur, et IGNACE BONHOMME, MICHEL MOISAN et PIERRE DROLET, habitants du dit lieu, ci-devant marguilliers de la dite paroisse, Défendeurs.

Sentence qui condamne les anciens marguilliers à faire les poursuites de ce qui est dû à la fabrique. (1)

Nous condamnons les Défendeurs à faire les poursuites nécessaires, à l'occasion de ce qui est dû par différents particuliers à la fabrique de la dite église. (*Prév.*, p. 12.)

PUISSANCE PATERNELLE.

PRÉVOSTÉ DE QUÉBEC, 15 mars 1729.

JOSEPH NORMAND, Demandeur, et ANDRÉ MARCOU, Défendeur.

Sentence qui condamne un père à remettre sa fille à son aïeul, qui se charge de l'élever et éduquer à ses propres frais. (2)

Nous ordonnons que le dit Marcou, père et tuteur de sa fille, la remettra au Demandeur, attendu que le Demandeur, grand-père de cet enfant, offre de l'élever à ses frais et dépens, sans qu'il en coûte la moindre chose au Défendeur, et de lui donner

(1) Nous croyons que cette décision ne sera pas suivie ; car c'est aux marguilliers en office à faire les poursuites des créances encore dues à la fabrique ; quoiqu'elles soient devenues exigibles avant leur entrée en office.

(2) L'article 243 C. C. dit que l'enfant reste sous l'autorité de ses père et mère jusqu'à sa majorité ou son émancipation.

l'éducation nécessaire, et même de la mettre dans un couvent, pour apprendre à travailler, ce qui est un avantage très grand pour la dite mineure, et qui lui conservera son revenu. (*Prév.*, p. 13.)

André Marcou a appelé de cette sentence au Conseil Supérieur, et le Conseil a, le 25 avril 1729, infirmé la sentence de la Prévosté par l'arrêt suivant :

Le Conseil a mis et met l'appellation et ce dont est appel au néant, émendant, ordonne que le dit Marcou gardera sa fille chez lui, jusqu'à ce qu'il l'ait dûment pourvue, et à la charge de lui fournir jusqu'à ce temps, les nourriture, logement, et entretien convenables, sans pouvoir exiger d'elle aucune pension et aucune diminution de ses revenus, et, au cas, où le dit Marcou serait refusant d'acquiescer aux susdites conditions, ordonne que la sentence sera purement et simplement exécutée, ce que le dit Marcou sera tenu d'opter dans trois jours dont il fera sa soumission au greffe. (*Con. S.*, p. 11.)

HUISSIER.—DEPENS.

PRÉVOSTÉ DE QUÉBEC, 15 mars 1729.

MARIE CANAC, veuve JINCHEREAU, Demanderesse, et JEAN-BAPTISTE GATIEN, Défendeur.

Saisie déclarée non valable vu qu'il n'y a aucune date dans l'exploit de saisie et l'huissier Fortier, condamné à rendre et restituer les frais qui ont été faits pour la dite saisie. (*Prév.*, p. 13.)

DEMENCE.—DONATION.—NULLITE.

PRÉVOSTÉ DE QUÉBEC, 2 mars 1731.

HENRI HICHÉ, au nom et comme fondé de procuration de Sieur SIMON HAIMARD, Demandeur, et LOUISE GUILLOT, veuve en secondes noces de feu sieur HAIMARD, Défenderesse, et LOUIS GOSSELIN, donataire du dit feu sieur HAIMARD, Partie intervenante.

Sentence qui déclare une donation nulle, pour cause de démence du donateur, et qui ordonne le partage des biens.

Nous, attendu la preuve que le dit sieur Haimard était en démence lorsqu'il a fait la dite donation au dit *sieur Gosselin*, avons déclaré et déclarons la dite donation nulle et de nul effet, et, en conséquence, faisant droit sur la demande formée contre la dite *Louise Guillot*, veuve *Haimard*, le 31 décembre 1729, nous ordonnons que partage sera fait des biens et effets de la communauté qui a été entre le dit feu sieur *Haimard*

et elle, par moitié, entre les héritiers du dit feu sieur *Haimard* et sa dite veuve, et, pour cet effet, condamnons à représenter, au dit nom, dans quinzaine pour tout délai l'inventaire qui a été fait après le décès du dit feu *Haimard*, des meubles, marchandises, livres, journaux, titres d'acquisition, et autres papiers de la dite succession. (*Prév.*, p. 15.)

Louise Guillot et Louis Gosselin ont appelé de cette sentence au Conseil Supérieur, et, le 11 décembre 1732, le conseil supérieur a rejeté l'appel par l'arrêt suivant :

Le Conseil a mis l'appellation au néant ; ordonne que la sentence dont est appel sortira, au résidu, son plein et entier effet, et, ayant aucunement égard aux conclusions prises par la dite veuve Haimard, ordonne que l'Intimé sera tenu de représenter le contrat sur l'Hôtel de la ville de Paris, prétendu dépendant de la communauté en question, et retiré par l'Intimé des mains de Sr Boutin, à l'effet de reconnaître si le dit contrat est un conquêt de communauté, et entrer, au dit cas, dans le partage ordonné par la sentence de la dite communauté, sauf au dit Gosselin les droits et actions qu'il prétend qu'il aurait fait valoir contre le dit feu Haimard, sans la donation en question, les fins de non recevoir et défenses de l'Intimé au contraire. (*Con. S.*, p. 17.)

SAISIE REELLE.—COMMISSAIRE.

PRÉVOSTÉ DE QUÉBEC, 1er juillet 1731.

PIERRE NOEL LÉVASSEUR, Demandeur, et CHARLES BOUIN DIT DUFRÊNE, Défendeur.

Sentence qui condamne un commissaire établi à une saisie réelle à accepter la charge, (1) et faire son devoir en icelle, à la charge d'être payé de ses salaires raisonnables. (*Prév.*, p. 17.)

RENTE CONSTITUEE.

PRÉVOSTÉ DE QUÉBEC, 22 avril 1732.

HENRI HICHÉ, au nom et comme tuteur, etc., Demandeur, et MARIE THÉRÈSE DE LAJOUE, veuve MORVILLE, Défenderesse.

Sentence qui condamne à rembourser le capital d'un constitut et les arrérages, faute de paiement de la rente. (2) (*Prév.*, p. 18.)

(1) On ne nomme plus maintenant de commissaires aux saisies réelles ; mais sous l'article 1823 C. C., on peut faire nommer un séquestre à un immeuble saisi.

(2) V. art. 1790 C. C.,

SAISIE.—GARDIEN.

PRÉVOSTÉ DE QUÉBEC, 6 mai 1732.

JOSEPH FERRE DUBURON, Demandeur, et le nommé CHAUMEREAU, au nom et comme gardien établi aux meubles saisis sur LOUIS FOURNEL, Défendeur.

Sentence qui décharge un gardien de meubles saisis, faute par le Demandeur de les avoir fait vendre dans les deux mois.

Nous, attendu que le Demandeur a laissé écouler, du jour de la saisie exécution faite du sieur *Fournel*, à l'assignation donnée au Défendeur, pour représenter les meubles, plus de deux mois, portés par l'article 172 de la coutume de Paris, titre des arrêts exécutions et gageries, pendant lesquels il était tenu d'en faire faire la vente, avons déclaré la dite saisie-exécution sans effet, et, en conséquence, déchargé le Défendeur de la présentation et de la garde des dits meubles saisis. (*Prév.*, p. 19.)

HUISSIERS.—OFFRES.

PRÉVOSTÉ DE QUÉBEC, 20 janvier 1733.

AMIOTTE DE VINCELOTTE, Demandeur, et le sieur DUPRÉ, Défendeur.

Sentence qui condamne un habitant à payer les rentes de sa terre à 30 sols l'argent, admet les offres faites à l'huissier bonnes et valables, réduit les frais de service, et taxe les frais de voyage, de séjour et de retour du Défendeur contre le Demandeur. (1)

Le Demandeur concluait à ce que le Défendeur fût condamné à lui payer les cens et rentes de la terre qu'il occupe dans la seigneurie de Vincelotte, et ce, depuis sa dernière quittance, et en l'amende, pour y avoir manqué au jour dit, et aux dépens ; le Défendeur disait qu'il les avait offerts à l'huissier porteur de l'exploit, même les frais de l'huissier.

Nous donnons acte au Défendeur des offres par lui faites à l'huissier Michon, de lui payer les cens et rentes dues au dit sieur de Vincelotte, même les frais de l'huissier, lesquelles offres il a réalisées en notre présence, montant le tout à la somme de 9 livres dix-huit sols six deniers, savoir : quatre livres, quatorze sols six deniers, pour la rente des dix-sept perches qu'il tient, à raison de 30 sols par arpent, et un sol pour le cens de la dite terre, ensemble cinq livres quatre sols, pour les frais de l'huissier ; le dit huissier ayant, dans le même jour,

(1) La jurisprudence est bien établie, aujourd'hui, que l'huissier porteur d'un exploit d'assignation, n'a pas droit de recevoir pour le Demandeur, et de donner quittance.

donné deux assignations, au dit lieu de la Rivière-Ouelle, l'une au dit Défendeur, et l'autre à Jean Gagnon, comme il nous a paru, laquelle somme nous condamnons le Défendeur de payer au Demandeur, suivant les dite offres ; et attendu lesquelles ainsi faites par le Défendeur à l'huissier, comme il paraît, au bas de son dit exploit, de payer les cens et rentes, et les frais de l'huissier, et, vu la copie de l'assignation, au bas de laquelle est la déclaration de l'huissier, comme le Défendeur lui a offert le dit paiement et frais, et qu'il lui était défendu de rien recevoir, comme en est convenu, le Demandeur, en notre présence, pour raison de quoi, vu l'acte d'affirmation de voyage fait par le dit Défendeur, nous condamnons le Demandeur à payer au Défendeur quinze livres, à quoi nous avons arbitré et taxé les frais de son voyage, séjour et retour au dit lieu de la Rivière-Ouelle. (*Prév.*, p. 20.)

Joseph Amyot a appelé de cette sentence au Conseil Supérieur, et le 9 février 1733, le Conseil a rejeté l'appel et confirmé cette sentence. (*Con. S.*, p. 19.)

INSCRIPTION DE FAUX.

PRÉVOSTÉ DE QUÉBEC, 25 novembre 1735.

PIERRE GERVAIS VOYER, Demandeur, *vs* PIERRE MICHELON, Défendeur.

Sentence qui ordonne le dépôt au greffe d'un billet inscrit de faux, et la consignation de soixante livres pour faire recevoir la dite inscription.

Le Demandeur concluait à ce que le Défendeur fût tenu de venir reconnaître sa signature au bas de son billet du 20 d'avril 1725, et le condamner à payer cent quinze livres dix sols, pour le contenu en icelui : par le défendeur était dit, qu'il n'avait jamais consenti ni signé le dit billet, pourquoi il déclarait qu'il s'inscrivait en faux contre les signatures qui sont au bas d'icelui, sur quoi est intervenu l'interlocutoire suivant :

Nous ordonnons que le dit billet par nous paraphé, *ne varietur*, sera déposé au greffe de cette Prévosté, et que le défendeur y formera son inscription en faux contre le dit billet, après qu'il aura consigné entre les mais du greffier, la somme de soixante livres, ordonnée pour faire recevoir sa dite inscription (1). (*Prév.*, p. 23.)

(1) V. art. 163 C. P. C.

ORDONNANCE DU COMMERCE.

PRÉVOSTÉ DE QUÉBEC, 16 octobre 1736.

FRANÇOIS HAVY, Demandeur, et FRANÇOIS PERRAULT, tous deux négociants de cette ville, Défendeur.

Sentence qui décharge le Défendeur du remboursement d'une lettre de change par lui endossée au Demandeur, faute de demande dans le temps prescrit par l'ordonnance du commerce.

Le Demandeur concluait à ce que le Défendeur fût condamné, et par corps, à lui payer 240 livres, montant de la lettre de change tirée par le sieur Longuemart de Vitry, sur le sieur Louis Boucher, le 27 de juin 1732, passé par le Défendeur, le 17 octobre 1732, à l'ordre du Demandeur; laquelle a été protestée, le 29 décembre même année, avec intérêts et frais, du jour du protest.

Attendu qu'il s'est écoulé quatre années depuis l'endossement de la lettre de change en question, sans qu'il ait été fait aucune demande de la part du Demandeur au Défendeur de la somme portée en la dite lettre de change, ce qu'il était obligé de faire, suivant l'ordonnance du commerce, nous renvoyons le dit Défendeur de l'action intentée par le dit Demandeur, sauf au dit Demandeur son recours, ainsi qu'il avisera bon être. (*Prév.*, p. 26).

MARCHANDE PUBLIQUE.—PROCEDURE.—QUALITE.

PRÉVOSTÉ DE QUÉBEC, 17 octobre 1736.

JEAN CORBIÈRE, négociant, Demandeur, et MAGDELEINE LAVERDIÈRE, femme de CHARLES DEMARS, faisant profession de marchande publique, Défenderesse.

Sentence qui condamne une marchande publique à payer 3494 livres, même par corps.

Vu l'obligation ci-devant datée, nous condamnons la dite Défenderesse, comme marchande publique, suivant la qualité par elle prise par la dite obligation, même par corps, à payer au Demandeur la somme de trois mille quatre cent quatre-vingt-quatorze livres, qu'elle lui doit, au désir de la dite obligation, et aux charges et conditions portées par icelle. (*Prév.*, p. 26.)

CONTRAINTE PAR CORPS.

PRÉVOSTÉ DE QUÉBEC.

JOSEPH MAUFAIT, Demandeur, et CATHERINE CHAPEAU, veuve MAUFAIT, Défenderesse.

Contrainte par corps, pour remise de pièces communiquées. (1)

Sentence qui condamne le Demandeur à remettre à la Défenderesse le compte et pièces justificatives qu'elle lui a communiqués, sous peine d'y être contraint par corps. (*Prév.*, p. 27.)

INVENTAIRE.

PRÉVOSTÉ DE QEÉBEC,

LOUIS ENOUILLE LANOIX, au nom et comme tuteur des enfants mineurs du premier lit de feu JOSEPH MORIN, et de MARIE-ANNE BRIDEAU, Demandeur, et DOROTHÉE GIRARD, veuve du dit feu MORIN, Défenderesse.

Nouvel inventaire ordonné, faute d'avoir appelé le tuteur des enfants mineurs d'un premier lit; avec injonction d'y procéder en sa présence, et celle des subrogés tuteurs des mineurs des deux lits:

Nous, faute par la Défenderesse d'avoir appelé à l'inventaire qu'elle a fait faire le Demandeur, en qualité de tuteur des enfants mineurs du premier lit de défunt Joseph Morin, ordonnons qu'il sera fait un nouvel inventaire, en présence du tuteur et du subrogé tuteur des mineurs du premier lit, ainsi qu'en la présence de la dite Défenderesse, et de son subrogé tuteur. (*Prév.*, p. 27.)

PRÉVOSTÉ DE QUÉBEC, 6 août 1737,

PIERRE SIMON, aubergiste, Demandeur, et la DAME VEUVE LARUE, Défenderesse.

Interlocutoire pour constater les réparations à faire à une maison. (2)

Nous ordonnons, avant faire droit, que la maison en question sera visitée par le *sieur Maillou*, architecte, qui dressera son rapport des réparations qui sont nécessaires à y faire, pour, à nous rapporté, être ordonné ce qu'il appartiendra. (*Prév.*, p. 30.)

TEMOIN.—EPOUX.

PRÉVOSTÉ DE QUÉBEC, 9 août 1737.

JOSEPH CAPELLIER, tailleur d'habits en cette ville, au nom et comme ayant épousé Mme A. POITRA, Demandeur, et MARIE-ANNE PETICLAIRE, veuve POITRA, Défenderesse.

(1) V. art. 2272 et 2273 C. C.

(2) V. art. 1641 C. C.

Interlocutoire pour entendre la femme du Demandeur. (1)

Vu l'exploit de demande du Demandeur, ensemble les défenses fournies par la Défenderesse, signifiées le septième de ce mois, nous ordonnons, avant faire droit, que la femme du Demandeur comparaîtra en personne pour être entendue. (*Prév.*, p. 33.)

BORNES.—ARPENTEUR.

PRÉVOSTÉ DE QUÉBEC, 9 août 1737.

LOUIS ROUER, Ecuier, Sr Dartigny, Demandeur, et JACQUES PAGÉ, marguillier de cette ville, etc., Défendeur.

Interlocutoire ordonnant à un arpenteur, de replacer les bornes qu'il avait arrachées.

Nous ordonnons que, dans trois jours, le Défendeur fournira ses défenses, contre la demande formée contre lui, et, par provision, ordonnons que les bornes en question, et qui ont été arrachées par le sieur *Beaupré*, arpenteur, suivant la déclaration du Défendeur, seront par lui, remises dans les mêmes endroits qu'elles étaient, suivant et conformément au procès-verbal qu'il en a dressé au mois de juillet 1730 ; et ce, en présence des parties intéressées, ou dûment appelées. (*Prév.*, p. 33.)

TIERS-SAISIE.—BILLET.

PRÉVOSTÉ DE QUÉBEC, 13 août 1737.

DAME LEFEBVRE, épouse du Sr OLIVIER, Demanderesse, et NICOLAS BESOLLE CASTILLON, Défendeur, et JACQUES LAFONTAINE, Tiers-Saisi.

Ordre à un tiers-saisi de conserver en ses mains le résidu de son billet, jusqu'à ce que délivrance en soit ordonnée avec celui à qui il est dû.

Serment pris du dit sieur Lafontaine sur la saisie faite entre ses mains, sur *Nicolas Besolle Castillon*, lequel a déclaré qu'il a fait au Défendeur son billet à ordre, pour 380 livres, payable en juin dernier, qu'il promet ne point acquitter, qu'au préalable, la Demanderesse ne le fasse ordonner avec lui à ses frais et dépens.

Nous donnons acte de l'affirmation et déclaration faite par le tiers-saisi, et, en conséquence, ordonnons qu'il conservera en ses mains les trois cent quatre-vingt livres, jusqu'à ce que le porteur du dit billet lui en fasse la demande, et qu'il en fasse

(1) V. art. 252 C. P. C., et art. 1231 C. C.

ordonner la délivrance avec lui, attendu la dite saisie faite à la requête de la Demanderesse (1). (*Prév.*, p. 34.)

SUCCESSION VACANTE.—CURATEUR.

PRÉVOSTÉ DE QUÉBEC, 24 septembre 1737.

ANT. et JOS. PACAUD, etc., Demandeurs, et LOUIS GUIGUIÈRE, curateur à la succession vacante de feu FRANÇOIS LEVASSEUR, Défendeur.

Sentence qui condamne un curateur, en sa qualité, à payer une somme de 2,662 livres 12 sols, en par les Demandeurs le faisant dire et ordonner, avec les créanciers saisissants et opposants. (2)

Nous condamnons le Défendeur au dit nom, à payer aux Demandeurs la somme de 2,662 livres 12 sols, en le faisant, par les Demandeurs, dire et ordonner, avec les autres créanciers saisissants et opposants, sur la succession du dit feu sieur Levasseur, entre les mains du dit sieur Guiguière. (*Prév.*, p. 40.)

ARBITRAGE.—NULLITE.

PRÉVOSTÉ DE QUÉBEC, 1er octobre 1737.

JOSEPH DÉLORME, charpentier, Demandeur, et ANTOINE MOUFLE, négociant, Défendeur.

Sentence qui déclare nul un rapport d'arbitres, pour avoir, le Demandeur, donné à boire et à manger aux dits arbitres, et n'avoir pas dressé leur rapport sur les lieux. (3)

Vu le procès-verbal de *Jouineau* et *Bedard* du 16 août dernier, nous, attendu que le dit Délorme est convenu devant nous qu'il a fait boire et manger sur le lieu les arbitres qui ont été nommés pour visiter la grange dont est question ; ce qui est contre l'ordonnance, que d'ailleurs, le procès-verbal des dits arbitres n'a point été dressé par eux sur les lieux, comme il est prescrit par la coutume, au titre des rapports, étant daté à Québec, du seize août dernier, lendemain de la prestation du serment, nous avons déclaré et déclarons le dit procès-verbal des dits arbitres nul, et débouté le dit Délorme de l'homologation d'icelui, ordonnons qu'il sera procédé à une nouvelle visite par un charpentier et un bourgeois dont les parties conviendront, sinon, qui seront par nous nommés d'office : lesquels prêteront préalablement serment devant nous, en la

(1) V. art. 565 C. P. C.

(2) V. art. 686 C. C.

(3) V. art. 1354 C. P. C.

manière accoutumée, et, en cas de contestation, prendront pour tiers un autre bourgeois pour leur rapport fait et rapporté être ordonné ce qu'il appartiendra. (*Prév.*, p. 41.)

VENTE.—NULLITE.

PRÉVOSTÉ DE QUÉBEC, 1er octobre 1737.

JOSEPH DE CHAVIGNY DE LA TESSERIE, Demandeur, et GENEVIÈVE GUYON DESPRÉS, veuve de feu FRS DE CHAVIGNY, Défenderesse.

Sentence qui déclare nul un contrat de vente, faute de ratification. (1)

Vu le dit contrat de vente ci-devant daté, signifié, à la dite dame Défenderesse ès-dites qualités, le 27 de septembre dernier, avec commandement de fournir les ratifications portées au dit contrat, nous, attendu la solidité mentionnée au dit contrat de vente, et faute par la Défenderesse d'avoir fourni les ratifications portées en icelui, ordonnons que le dit contrat demeurera nul et sans effet, et remettons les parties au même et semblable état qu'elles étaient avant la passation d'icelui ; faisons droit sur la demande du Demandeur, condamnons la dite Défenderesse, ès-dites qualités, et faisant pour le dit sieur Frs de Lachevrotière, son fils aîné, à payer au dit Demandeur la dite somme de mille livres, à laquelle se monte la bâtisse qu'il a fait faire à neuf du moulin à farine qui est sur la dite seigneurie de Lachevrotière, et faute de paiement d'icelle, déclarons le dit moulin affecté au paiement de la dite somme de mille livres ; et ordonnons qu'il touchera jusqu'à parfait remboursement les revenus du dit moulin, et condamnons la dite Défenderesse, ès-dites qualités, aux intérêts de la dite somme jusqu'à l'actuel payement. (*Prév.*, p. 42.)

EXCEPTION A LA FORME.

PRÉVOSTÉ DE QUÉBEC, 9 octobre 1737.

JOSEPH NOUCHEL, négociant de cette ville, Demandeur, et GABRIEL GREYSAC, négociant, et son épouse, Défendeurs.

Action déboutée, pour défaut de signature de la requête par le Demandeur ou d'un procureur fondé.

Vu les défenses, nous renvoyons le Demandeur de l'action par lui intentée aux dits défendeurs, attendu la nullité causée par le défaut de signature du dit sieur Nouchel, n'étant pas exprimé, dans la dite requête, que le sieur Latour qui a signé

(1) V. art. 1028 C. C.

la dite requête soit son procureur fondé ; et condamnons le Demandeur aux dépens du présent extraordinaire ; sauf à lui Demandeur à se pourvoir, par nouvelle action, ainsi qu'il avisera bon être. (*Prév.*, p. 43.)

BILLET.—ECHEANCE.

PRÉVOSTÉ DE QUÉBEC, 14 octobre 1737.

LOUIS GUIGNIÈRE, curateur, etc., Demandeur, et FRANÇOIS FOUCHER, procureur de MONTRÉAL, Défendeur.

Sentence de ce jour, pour paiement d'un billet payable en octobre.

Nous condamnons le dit Défendeur à payer au Demandeur, au dit nom, la somme de six cent six livres onze sols quatre deniers, portée en son dit billet, attendu que le dit billet est conçu payable dans le mois d'octobre, et non dans tout le mois d'octobre, et le condamnons aux intérêts de la dite somme, du jour de la demande, jusqu'à l'actuel payement ; et à l'égard des 822 livres 4 sols 6 deniers, demandés pour marchandises fournies par le Demandeur, depuis le dit billet, ordonnons, avant de faire droit, que le Demandeur fera signifier au Défendeur la facture, ou mémoire des dites marchandises à lui fournies depuis le dit billet. (*Prév.*, p. 43.)

INJURES DANS UN PLAIDOYER.

PRÉVOSTÉ DE QUÉBEC, 15 octobre 1737.

ETIENNE et JOSEPH CHAREST, etc., Demandeurs, et JACQUES CHARLY, négociant de MONTRÉAL, Défendeur.

Ordre de rayer et biffer de la requête le terme *extorqué*, et faire nouvelle élection de domicile en cette ville. (1)

Les Demandeurs concluaient à l'entérinement des lettres de rescision et de restitution en entier, par eux obtenues le 19 août dernier contre la transaction du 28 février, à la cassation de la dite transaction et à mettre les parties au même état qu'elles étaient avant icelle, et au surplus faire défense au dit sieur Charly de désemparer de cette ville qu'il n'ait élu domicile. Par le Défendeur, a été demandé acte de la plainte qu'il fait contre le sieur Latour, sur ce que, dans la dite requête, il a la témérité d'accuser lui Défendeur d'avoir extorqué des Demandeurs une transaction, pour quoi, demande justice de ces termes injurieux et calomnieux.

(1) V. art. 9 C. P. C.

Nous ordonnons que le terme d'*extorqué* énoncé dans la dite requête, sera rayé et biffé. (*Prév.*, p. 44.)

TUTELLE.—PERE.—ENFANTS.

PRÉVOSTÉ DE QUÉBEC, 31 décembre 1737.

LOUIS FORTIN, faisant et stipulant pour CLAUDE FORTIN son fils, Demandeur, et AMYOT DE VINCELOTTE, Défendeur.

Sentence pour salaire d'un fils à la poursuite d'un père, avec dépens et frais de voyage, retour et passage. (1)

Nous condamnons le dit sieur *Vincelotte* à payer au dit *Louis Fortin* faisant pour *Claude Fortin* son fils, la somme de 32 livres qu'il lui doit pour deux mois qu'il l'a employé à son service tant à faire ses foins que récoltes, et le condamnons aux dépens liquidés à 4 livres, et 12 livres accordées au dit Demandeur pour les deux voyages qu'il a été obligé de faire, retours et passages. (*Prév.*, p. 48.)

TUTELLE.—TUTRICE.

PRÉVOSTÉ DE QUÉBEC, 11 février 1738.

PIERRE PREVOST et CONSORTS, etc., Demandeurs, et GENEVIÈVE SEDILLOT, veuve JEAN-BTE PREVOST, commune en biens avec le dit défunt, et tutrice de ses enfants mineurs, Défenderesse.

Ordre à une tutrice de prendre qualité pour ses enfants mineurs. (2)

Nous ordonnons que la Défenderesse sera tenue dans quinzaine, que nous lui accordons, de prendre qualité pour ses dits mineurs, soit d'héritiers purs et simples de leur dit père, ou d'héritiers sous bénéfice d'inventaire ; sinon, et le dit temps passé, sera fait droit sur la demande des Demandeurs portée en leur dite requête. (*Prév.*, p. 50.)

SOLIDARITE.—HERITIERS.

PRÉVOSTÉ DE QUÉBEC, 28 février 1738.

PIERRE LEFEBVRE, Demandeur, et MARIE BLOUIN, veuve CAMPAGNA, comme commune en biens avec son défunt mari et tutrice de ses enfants mineurs et autres enfants majeurs, Défendeurs.

(1) V. art. 304 C. C.
(2) V. art. 301 C. C.

Obligation d'un défunt déclarée exécutoire contre ses héritiers solidairement. (1)

Vu l'obligation ci-devant datée, nous déclarons exécutoire la dite obligation contre les dits Défendeurs et défaillants, comme elle l'aurait été contre le dit feu Campagna, et en conséquence condamnons les dits Défendeurs et défaillants ès-dites qualités, et solidairement, à payer au Demandeur la dite somme de trois cent cinq livres pour le montant de la dite obligation, et les condamnons aux intérêts de la dite somme du jour de la demande jusqu'à l'actuel payement. (*Prév.*, p. 52.)

HERITIERS SOUS BENEFICE D'INVENTAIRE.

PRÉVOSTÉ DE QUÉBEC, 11 mars 1738.

FRANÇOIS PERRAULT, négociant, Demandeur, et CHARLES RUETTE, au nom et comme héritier sous bénéfice d'inventaire de feu FRANÇOIS RUETTE, Défendeur.

Jugement sur affirmation du Demandeur contre un héritier sous bénéfice d'inventaire, à la charge de rapporter en cas de contribution.

Vu les billets et compte, le tout signifié au Défendeur au dit nom, nous condamnons le Défendeur au dit nom à payer au Demandeur la somme de cinq cent soixante et deux livres cinq sols, à lui due pour le montant des billets du dit feu sieur D'Auteuil et compte, et le condamnons aux intérêts de la dite somme du jour de la demande jusqu'à l'actuel payement; ordonnons que faute de payement de la dite somme en principal, intérêts et frais, les meubles et effets contenus en l'inventaire qui a été fait après le décès du dit feu sieur D'Auteuil seront vendus suivant la coutume, pour sur le produit d'iceux être le Demandeur payé des sommes à lui dues en principal, intérêts et frais, et en cas d'insuffisance, permettons au Demandeur de faire saisir les revenus des immeubles de la succession du dit feu sieur D'Auteuil, aux offres que fait le Demandeur de donner bonne et suffisante caution de rapporter, si le cas y échoit, la somme qui lui sera payée, pour venir à contribution. (*Prév.*, p. 54.)

INJURE.—DOMMAGE.

PRÉVOSTÉ DE QUÉBEC, 15 et 22 avril 1738.

LOUIS LIARD, tailleur d'habits, et FRANÇOIS DUPONT, Demandeurs, et CLAUDE LEGRIS, forgeron, et L. VALIÈRE DIT LAGARENNE, menuisier, Défendeurs.

(1) V. art. 1122 C. C.

Action d'injure et réparation d'honneur ordonnée devant témoins, avec amende et dépens.

Cette action était pour injures, notamment pour avoir dit que les Demandeurs étaient des races de pendus ; ce que les Défendeurs niaient, disant qu'au contaaire qu'ils avaient toujours reconnu les Demandeurs pour hommes de bien et leur famille pour être sans tache ; nonobstant cette reconnaissance les Demandeurs ont offert de faire preuve par témoins, sur quoi est intervenu l'interlocutoire suivant. Nous admettons les Demandeurs à faire la preuve par eux demandée, et aux Défendeurs la preuve au contraire.

Le 22 avril 1738, les Demandeurs ont produit et fait entendre plusieurs témoins. Nous ordonnons que les dits *Legris* et *Lagarenne* se dédiront des faits calomnieux et offensants dont ils se sont servis et qui causent un préjudice notable à la famille des Demandeurs, et ce en présence des trois personnes telles que les Demandeurs les voudront choisir, et aussi en celle des dits témoins et condamnons les dits *Legris* et *Lagarenne* en chacun trois livres d'amende applicable aux pauvres de l'Hôtel-Dieu de cette ville, et les condamnons aux dépens. (*Prév.*, p. 55.)

SAISIE-EXECUTION.

PRÉVOSTÉ DE QUÉBEC, 9 septembre 1739.

FRANÇOIS PERRAULT, créancier de CHARLES LAPALME, Demandeur, et les sieurs CHAREST, créanciers saisissants, Défendeurs.

Subrogation au lieu et place d'un créancier saisissant et négligeant de poursuivre la saisie. (1)

Nous ordonnons que dans huitaine pour tout délai, les Défendeurs suivront les causes de la saisie faite à leur requête sur le dit *Lapalme*, sinon et le dit temps passé le dit Demandeur sera subrogé en leur lieu et place, et poursuivra les causes de la saisie pour être payé des sommes qui lui sont dues en principal et frais. (*Prév.*, p. 58.)

INVENTAIRE.—RECEL.

PRÉVOSTÉ DE QUÉBEC, 19 février 1740

JUSTE CRENET DIT BEAUVAIS et MARIE MARCHAND sa femme, veuve PIERRE EVÉ, Demandeurs, et CHARLOTTE VERGEAT, veuve de LOUIS EVÉ, Défenderesse.

Sentence à l'occasion d'effets recélés lors de la confection d'un inventaire.

(1) V. art. 1031 C. C.

Nous ordonnons que la paire de boucles d'argent ainsi que la somme qui se trouvera due par le Sr de Lagorgendière, agent de la compagnie des Indes en ce pays, pour les gages qui étaient dus au dit feu Louis Evé, en qualité de brigadier des gardes de la dite compagnie, seront portés par addition en l'inventaire qui a été fait, la dite veuve Evé déclarant que c'est par oubli si elle n'y a pas fait insérer la dite paire de boucles, et qu'elle n'avait pas connaissance alors de ce qui pouvait être dû de gages à feu son mari par le dit Sr de Lagorgendière ; et à l'égard des effets dont les sœurs de la dite veuve Evé se sont trouvées saisies et par elles enlevées, nous condamnons la dite veuve Evé à être privée de sa moitié dans les dits effets recélés et de l'usufruit d'iceux suivant sa donation, et ordonnons qu'ils appartiendront pour le tout aux dits Crenet dit Beauvais et Marie Marchand, sa femme, héritiers du dit feu Louis Evé. (*Prév.*, p. 58.)

Marie Marchand, veuve de Juste Crenet dit Beauvais, appela de cette sentence au Conseil Supérieur, mais elle s'est ensuite désisté de son appel, et, le 28 novembre 1740, le Conseil Supérieur a donné acte à Charlotte Vergeat de ce désistement, et a mis les parties hors de cour sur l'appel. (*Con. S.*, p. 39.)

RESPONSABILITE.—DOMMAGES.

PRÉVOSTÉ DE QUÉBEC, 19 juillet 1740.

PIERRE COURTANT, journalier de cette ville, Demandeur, et ANTOINE SERT, charretier de cette ville, Défendeur.

Dédommagement pour avoir, par imprudence, le Défendeur blessé avec son harnais un enfant.

Vu le certificat délivré par le sieur *Lajus*, chirurgien en cette ville, de l'état du dit enfant, en date de ce jour, nous, sans avoir égard aux défenses proposées par le dit Défendeur, le condamnons à payer au dit Demandeur la somme de cinquante livres, par forme de dédommagement, pour avoir blessé avec son harnais et par imprudence l'enfant du Demandeur. (*Prév.*, p. 59.)

Sert a appelé de cette sentence au Conseil Supérieur, et, le 1er août 1740, le Conseil a rendu le jugement suivant :

Le Conseil a mis et met l'appellation, et ce au néant, émendant, condamne le dit Sert à payer au dit Courtant la somme de six livres, pour tous dommages et intérêts, et en tous les dépens. (*Con. S.*, p. 38.)

PRIVILEGE.

PRÉVOSTÉ DE QUÉBEC, 20 octobre 1741.

LOUIS DAILLEBOUT, Sr de COULONGE, Demandeur, et HENRY CAMPEAU, fondé du pouvoir de LOUIS CAMPEAU son frère, Défendeur.

Saisie de pelleteries déclarée bonne et valable, et le saisissant payé par privilége et préférence.

Vu l'obligation ci-devant datée, par laquelle, entre autres choses, le dit *Louis Campeau* s'est obligé de payer au Demandeur la somme de 1344 livres 11 sols 4 deniers, dans le cours du mois d'août dernier en castor au prix du bureau, ou bonnes pelleteries au prix de Québec, nous, attendu que le dit *Henri Campeau* convient que les pelleteries saisies appartiennent à *Louis Campeau* son frère, et qu'il les lui a adressées, nous ordonnons que sur le montant des dites pelleteries saisies entre les mains des sieurs Havy et Lefèvre, le dit Demandeur sera payé par privilége et préférence de la somme de 1344 livres 11 sols et 4 deniers, pour le montant de la susdite obligation, aux termes et clauses d'icelle. (*Prév.*, p. 59.)

MEPRIS DE COUR.

PRÉVOSTÉ DE QUÉBEC, 14 novembre 1741.

IVES ARGUIN, négociant, Demandeur, et LÉONARD JEAN DIT TOURANGEAU, journalier, Défendeur.

Amende contre le Défendeur, pour avoir offert, contre la bonne foi, d'affirmer qu'il ne devait rien.

Nous, attendu la preuve résultante des témoins entendus en notre sentence du 31 octobre dernier, et que d'ailleurs le dit Tourangeau a voulu faire son affirmation contre la bonne foi, qu'il ne devait pas au Demandeur la dite somme de 90 livres 10 sols, à lui demandée, nous le condamnons à payer au dit Demandeur la dite somme de 90 livres 10 sols qu'il est justifié qu'il doit pour le restant de fournitures portées au compte du Demandeur ; et, sur la requisition du procureur du roi, à ce qu'il nous plût condamner le dit Défendeur en telle amende qu'il nous plaira, pour avoir, contre la bonne foi, offert d'affirmer qu'il ne devait rien dans le temps, qu'au contraire il est prouvé qu'il doit, nous, ayant égard au dit réquisitoire, avons condamné le dit Défendeur en vingt livres d'amende, applicable moitié aux pauvres de l'Hôtel-Dieu, et l'autre moitié à l'hôpital général de cette ville, desquels payements il sera

tenu de certifier par quittances des dépositaires des dites communautés, dans huitaine pour tout délai, à quoi faire sera contraint, même par corps, lui faisons défense de récidiver, sous peine afflictive. (*Prév.*, p. 60.)

Jean dit Tourangeau appela de cette sentence au Conseil Supérieur, et le 18 décembre 1741 le Conseil Supérieur rendit l'arrêt suivant :

Le Conseil a mis et met l'appellation au néant, ordonne de ce dont est appel sortira effet, par rapport à la condamnation de quatre-vingt-dix livres dix sols, portée par la dite sentence, a déchargé le dit Appelant de la condamnation d'aumône. (*Cons. S.*, p. 42.)

DOMMAGE.

PRÉVOSTÉ DE QUÉBEC, 24 novembre 1741.

JOSEPH LEBLOND et sa femme, Demandeurs, et JOSEPH DROUIN fils, Défendeur.

Révocation de donation déclarée bonne et valable, pour défaut d'accomplir les charges.

Il nous paraît que le Défendeur ne justifie pas qu'il a exécuté de remplir les charges portées par la dite donation envers le Demandeur auquel il s'est obligé par le susdit acte de donation passé entre les parties le 24 mars 1739, duquel fait les Demandeurs font leur deuxième chef de plainte, nous avons déclaré et déclarons bonne et valable la révocation de la dite donation, et ordonnons qu'en conséquence les donateurs soient rétablis dans la paisible jouissance et propriété des choses par eux données au Défendeur. (*Prév.*, p. 60.)

Joseph Drouin appela de cette sentence au Conseil Supérieur, et, le 16 avril 1742, le Conseil Supérieur rendit l'arrêt suivant :

Le Conseil a mis et met l'appelation au néant, ordonne que la sentence dont est appel sortira effet. (*Con. S.*, p. 43.)

TUTELLE.

PRÉVOSTÉ DE QUÉBEC, 13 mars 1742.

PIERRE GERVAIS VOYER, subrogé tuteur des mineurs des défunts PIERRE MICHELON et AUG. CHAURET, Demandeur, et ROMAIN DALBEC, comme ayant été nommé tuteur aux dits mineurs, Défendeur.

Tuteur condamné à rester tuteur et à prêter serment en la dite qualité.

Nous, sans avoir égard aux défenses proposées de la part du dit Dalbec, ordonnons qu'il restera tuteur aux dits mineurs Michelon, et comparaîtra devant nous pour prêter serment en la dite qualité. (*Prév.*, p. 61.)

BILLET PROMISSOIRE.—SAISIE-ARRET.

PRÉVOSTÉ DE QUÉBEC, 8 janvier 1743.

JEAN LIQUART, négociant, ayant l'ordre de MICHEL PETRIMOULT, Demandeur, et JACQUES NOUETTE, praticien, Défendeur.

Action déboutée sur un billet à ordre transporté après connaissance d'une saisie-arrêt. (1)

Vu le dit billet et les ordres au dos, le premier de la demoiselle Pondret au sieur Petrimoult, du 25 octobre dernier, et le second du sieur Petrimoult au sieur Liquart, du 3 du présent mois; vu aussi deux saisies et arrêts faits le 7 décembre dernier par l'huissier Thibault, à la requête des sieurs Martel de Belleville et Dumont, sur le sieur Petrimoult entre les mains du dit sieur Nouette, débiteur du dit billet à ordre, un prononcé de M. l'intendant du 19 décembre, portant acte aux parties de ce qu'elles consentent comparaître devant nous, ce qui s'entend pour raison du billet en question et des dites saisies, ensemble copie de la requête à nous présentée par le dit sieur Petrimoult, afin de condamnation contre le dit sieur Nouette du contenu au dit billet, la dite requête signifiée par Courtin, huissier le 20 du dit mois de décembre, ce qui a dû empêcher le dit sieur Petrimoult, qui s'était pourvu par action et qui avait connaissance des dites saisies, de transporter, comme il a fait, le dit billet le 3 du présent mois au dit sieur Liquart: nous avons renvoyé le dit sieur Liquart de la demande, par lui formée contre le dit sieur Nouette pour raison du billet en question, sauf son recours, ainsi qu'il avisera; les saisies faites à la requête des dits sieurs *Martel de Belleville* et Dumont tenantes entre les mains du dit Nouette, débiteur du dit billet. (*Prév.*, p. 61.)

SAISIE.—GARDIEN.—RESPONSABILITE.

PRÉVOSTÉ DE QUÉBEC, 31 décembre 1743.

JACQUES GOURDEAUX, Demandeur, et JOACHIM DESMOLIER, Défendeur.

Gardien d'effets saisis condamnés par corps à les représenter ou à payer les causes de la saisie. (2)

Nous ordonnons que dans huitaine pour tout délai, le Défendeur sera tenu de faire les diligences nécessaires pour re-

(1) V. art. 565 C. P. C.

(2) V. art. 597 C. P. C.

couvrer les meubles dont il s'agit, et les représenter comme gardien ; sinon et le dit temps passé, nous le condamnons en sa dite qualité de gardien, et par corps, à payer au Demandeur la somme de 300 livres de principal, intérêts, frais et dépens, causes de la saisie, sauf son recours en cas de paiement ainsi qu'il avisera : condamnons en outre le dit Défendeur au dit nom, aux dépens liquidés à cinq livres douze sols, que le Défendeur pourra répéter contre les dits Hévé et sa femme. (*Prév.*, p. 62.)

SEDUCTION.—DOMMAGES.

PRÉVOSTÉ DE QUÉBEC, 12 décembre 1747.

LOUIS ROI, stipulant pour MARIE JOSEPH ROI, sa fille mineure, Demandeur, et le nommé Sr LOUIS, habitant de l'Islet, Défendeur.

Procédure contre le père putatif d'un bâtard.

Vu la requête de demande du dit Roi et de sa dite fille concluant, pour les raisons y contenues, à ce qu'il nous plaise condamner le Défendeur à payer à la dite Marie Joseph Roi, stipulante comme ci-devant, la somme de cinq cents livres, par forme de dommages-intérêts, ensemble les frais de couche, et de faire élever et entretenir l'enfant qui naîtra de la dite Marie Joseph Roi, concluant aux dépens ; par le Défendeur a été dit, qu'il est bien vrai que la fille du Demandeur a resté trois mois chez lui en service et n'en est sortie que vers le commencement d'août dernier ; qu'il est faux, sauf respect, qu'il ait eu aucun commerce avec la fille du dit Roi ; qu'il ne s'est jamais aperçu de son mauvais commerce, et cependant en dernier lieu qu'il s'en est aperçu et aussitôt avertit le curé de sa paroisse ; pourquoi conclut à être renvoyé de l'action contre lui intentée par la dite Marie Joseph Roi, stipulante comme dessus, après serment par elle fait de dire vérité, par nous pris d'office, a été répliqué, qu'elle soutient au contraire que c'est le dit Défendeur, et que c'est de ses œuvres qu'elle est devenue grosse, et qu'après l'avoir sollicitée plusieurs fois, il la enfin fait coucher dans son lit avec sa femme même, et la fait mettre au milieu du lit et lui Défendeur à côté, ou il abusa d'elle ; qu'après, lui dit Défendeur la suivit partout où elle pouvait aller, et abusait de sa facilité ; qu'elle a plusieurs fois averti le dit Défendeur qu'elle était grosse, à quoi il lui répondait qu'elle n'avait qu'à faire des remèdes pour empêcher la suite de sa grossesse, et que même elle a averti la femme du Défendeur de ses sollicitations et mauvais commerce qu'elle avait avec lui ; qu'il est vrai que la femme du dit Défendeur l'a mise dehors de chez elle, et lui conseilla de s'en aller, et ce au commencement d'août

dernier, lui disant que son mari la faisait enrager, qu'un jour même le Défendeur voulant envoyer sa femme au lieu nommé St-Roch, pour profiter de ce temps pour la saigner au pied, et qu'elle en avertit la femme du dit Défendeur, de laquelle déclaration, avons donné l'acte et a la dite Roi persisté dans icelle et déclaré ne savoir signer de ce enquis ; par le Défendeur encore répliqué, qu'il est prêt et offre de prouver que la dite Marie Joseph Roi a eu un mauvais commerce avec le nommé François Vaillancour, habitant de l'Islet, et que ce n'est point lui Défendeur qui a eu commerce avec elle ; et par la dite Marie Joseph Roi a été répondu, qu'elle n'a point eu de mauvais commerce qu'avec le dit Défendeur, et par le procureur du Roi, de cette Prévosté a été requis, qu'attendu qu'il s'agit dans la présente cause d'un maître avec son domestique, il conclut à ce que le dit sieur Louis, Défendeur, soit condamné en douze livres d'aumône applicable à l'hôpital général près cette ville.

Nous condamnons le dit sieur Louis, Défendeur, à avoir soin de l'enfant qui naîtra de la dite Marie Joseph Roi ; qu'il sera tenu d'avertir le dit procureur du Roi de sa naissance, aussitôt qu'il sera venu au monde, et de l'endroit où il aura été mis en nourrice, et ensuite en avoir soin suivant son état et l'élever dans la religion catholique, apostolique et romaine ; et sera tenu d'en rapporter un certificat tous les trois mois au dit procureur du Roi ; condamnons le dit sieur Louis et par corps en cent vingts livres pour tenir lieu à la dite Roi, tant de dommages-intérêts que frais de gésine ; et faisant droit sur les conclusions du procureur du Roi, condamnons le dit sieur Louis, Défendeur, en douze livres d'aumône applicable aux religieuses de l'hôpital général de cette ville dont il sera tenu de rapporter un reçu de la dépositaire du dit hôpital général au procureur du Roi, dans huitaine ; et le condamnons en outre aux dépens liquidés à trois livres dix sols, ces présentes non comprises. (*Prév.*, p. 63.)

NOTAIRE.—INJONCTION.

PRÉVOSTÉ DE QUÉBEC, 2 avril 1748.

Le procureur du Roi, Demandeur, et le Sr VAUCOUR BELLEVUE, Défendeur.

Défense au Sr Bellevue d'instrumenter comme notaire. (1)

Vu le réquisitoire contenant entre autres choses que Mtre Pinguêt Vancour, notaire en cette Prévosté, ne pouvant plus s'acquitter de cet office, par ses indispositions, le sieur Belle-

(1) V. art. 1016 C. P. C.

vue, son père, qui demeure avec lui, va passer, tant dans les côtes que dans la ville, des actes, contrats de mariage, et même des inventaires, et reçoit le serment en tel cas requis, sans qu'il ait aucune qualité ni fonction qui puissent lui permettre, se contentant seulement de les faire signer par le dit Mtre Pinguêt Vaucour, notaire, son frère, pourquoi le dit procureur du Roi conclut à ce qu'il nous plaise faire défense au dit Bellevue de passer aucuns contrats, actes, faire inventaires, recevoir le serment des parties, et enfin ne faire aucune fonction de notaire, sous les peines de droit ; nous faisons défense au dit Pinguêt Bellevue de passer aucuns contrats, actes, ni faire aucuns inventaires et fonction de notaire sous les peines de droit. (*Prév.*, p. 66.)

VENTE.—AUBERGISTE.

PRÉVOSTÉ DE QUÉBEC, 14 mai 1748.

MICHEL ROUILLARD, aubergiste, Demandeur, et PIERRE DÉCHAMP, voilier, Défendeur.

Aubergiste débouté de son action. (1)

Nous, attendu que la somme de dix livres dix sols demandée au dit Défendeur est une dette de cabaret, nous l'avons renvoyé de l'action contre lui intentée. (*Prév.*, p. 66.)

PREUVE.

PRÉVOSTE DE QUÉBEC, 28 avril 1750.

FRANÇOIS VIGNAUD, marchand, Demandeur, et SR LAMALETIE, négociant, curateur, Défendeur.

Notaire autorisé à prendre l'affirmation d'un compte. (2)

Nous condamnons le Défendeur à payer, en sa qualité, au Demandeur, huit cent quarante livres quinze sols, à lui dues par feu Bezian, pour les causes portées en son mémoire ; avec intérêts et dépens, en par le Demandeur affirmant, devant le notaire du lieu et deux témoins, que son mémoire est véritable et qu'il n'a rien reçu à compte. (*Prév.*, p. 69.)

(1) V. art. 1481 C. C.

(2) V. art. 300 C. P. C.

BORNAGE.

PRÉVOSTÉ DE QUÉBEC, 28 juillet 1750.

JEAN ANETIL, Demandeur, et LOUIS GRONDIN, Défendeur.

Bornage et arpentage déclarés informes, faute de mention des titres des parties. (1)

Attendu qu'il n'est pas fait mention des titres des parties, dans le procès-verbal de Mtre Lefrançois, arpenteur, ce qui le rend informe, nous ordonnons avant faire droit, qu'il sera procédé à un nouveau bornage et arpentage par Mtre Nicolas Olide, nommé d'accord partie. (*Prév.*, p. 71.)

MEPRIS DE COUR.

PRÉVOSTÉ DE QUÉBEC, 11 août 1750.

SR ABEL, capitaine de navire, Demandeur, et FRS GIRARD DIT BRETON, charretier, Défendeur.

Amende imposée pour manque de respect à justice. (2)

Attendu que le dit Abel a manqué de respect à justice, en disant qu'il arriverait malheur si le dit Breton restait dans la dite maison, nous condamnons le dit Abel en dix livres d'amende, applicable à l'hôpital général près cette ville ; ce qui sera exécuté nonobstant opposition, ou appellation quelconque, et sans préjudice d'icelle. (*Prév.*, p. 71.)

SEPARATION DE CORPS.

PRÉVOSTÉ DE QUÉBEC, 28 janvier 1755.

JACQUES COULOMBE, de Charlesbourg, Appelant de la sentence rendue en la juridiction de Notre-Dame des Anges, et MARIE JEANNE RENAUT, sa femme, Intimée.

Sentence en séparation de corps et de biens volontaire, de la juridiction de Notre-Dame des Anges, renversée (3)

Par laquelle sentence " il était donné acte aux parties de " leurs dires et demandes, et attendu l'incompatibilité qui se " trouve entre la dite Renaut et le dit Coulombe, suivant " toutes les représentations par eux faites, et de leur consente-

(1) V. art. 945 C. P. C.

(2) V. art. 7 C. P. C.

(3) V. art. 186 C. C.

" ment leur est accordée la séparation de leurs personnes et " biens d'autant qu'ils ne peuvent compatir ensemble." L'Intimée soutenait que la sentence de séparation devait être confirmée parce qu'il paraissait, par un acte du 13 juillet 1754, passé devant Mtre Genet, notaire, que c'était l'Appelant qui avait lui-même requis la séparation, et que, par un autre acte du trois de décembre, même année, les parties ayant procédé au partage et division des biens de leur communauté, il en résultait une séparation réelle..

Nous, sans nous arrêter aux exceptions proposées par l'Intimée, disons qu'il a été mal jugé et bien appelé ; en conséquence, ordonnons que l'Intimée sera tenue de retourner avec l'Appelant, son mari, lequel sera tenu de la recevoir et la traiter en bon mari. (*Prév.*, p. 73.)

MUR DE CLOTURE.

PRÉVOSTÉ DE QUÉBEC, 6 mai 1755.

CHARLES BERTHELOT, Demandeur, et ANTOINE SABOURIN, au nom et comme ayant épousé la Vve BACHELIER, et tuteur de leurs enfants, Défendeur.

Sentence pour un mur de clôture. (1)

La demande était pour faire un mur de clôture ; le Défendeur disait, pour défense, qu'il y avait une bonne clôture de pieux, que le mur demandé serait une dépense inutile et considérable pour les mineurs, qu'il serait même obligé de démolir ses bâtiments. Nonobstant ces raisons, est intervenue la sentence suivante :

Nous condamnons le Défendeur à contribuer avec le Demandeur à faire un mur de clôture pour séparer la cour jusqu'à la hauteur de dix pieds du rez-de-chaussée, compris le chaperon, conformément à la coutume de Paris ; lequel mur sera fait à frais communs, et fourni par chacune des parties la moitié du terrain. (*Prév.*, p. 73.)

PENSION ALIMENTAIRE.

PRÉVOSTÉ DE QUÉBEC, 11 avril 1758.

MARGUERITE SEDILLOT, veuve COUTURE, Demanderesse, et JEAN COUTURE, tant en son nom que comme tuteur de ses frères et sœurs et autres, ses gendres, Défendeurs.

Pension alimentaire accordée à la charge d'un abandon. (2)

(1) V. art. 505 C. C.

(2) V. art. 166 et 167 C. C.

Nous condamnons les Défendeurs à payer à la Demanderesse cent cinquante livres de pension annuelle et sa vie durante, à compter de ce jour payable de quartier en quartier et solidairement, un d'eux seul pour le tout, entre les Défendeurs; au moyen de quoi la Demanderesse sera tenue de faire un abandon en bonne et due forme, aux Défendeurs, de ses biens meubles et immeubles, à l'exception de son lit garni, hardes et linges à son usage. (*Prév.*, p. 77.)

SALAIRE.—DESERTION.

PRÉVOSTÉ DE QUÉBEC, 22 août 1758.

FRANÇOIS CLESSE, Demandeur, et FRANÇOIS GATEL, Défendeur.

Salaire non alloué pour cause de désertion. (1)

Nous, attendu que le dit Clesse, fils, n'a pas fini son temps, suivant l'engagement du 1er août 1756, et qu'il s'est évadé de chez le Défendeur pour s'embarquer dans un bâtiment, sans être retourné chez le Défendeur, avons déclaré le Demandeur non recevable dans sa demande. (*Prév.*, p. 78.)

SAISIE D'IMMEUBLES.

PRÉVOSTÉ DE QUÉBEC, 24 octobre 1758.

DOMINIQUE LE GLISSE, Demandeur, et JOSEPH TRUDEL, Défendeur.

Vente d'un immeuble, avec le consentement des parties, sans procéder à la vente des meubles. (2)

Le Demandeur concluait à ce que la saisie-exécution des meubles du Défendeur fût déclarée bonne et valable, et iceux meubles vendus pour être payés de son dû; le Défendeur représentait que la vente d'iceux le mettrait sur le pavé, et offrait de laisser vendre sa maison par préférence, par décret ou autrement, ce que le Demandeur acceptait; en conséquence, intervint la sentence suivante :

Nous avons donné acte des dires et consentements des parties, en conséquence donnons main-levée de la saisie-exécution faite par le Demandeur sur le Défendeur le treize de juin dernier, et avons autorisé le Demandeur à faire vendre la maison du Défendeur par décret ou autrement, pour, sur

(1) V. art. 1670 C. C.

(2) V. art. 554 C. P. C.

les deniers en provenant, être le Demandeur payé de son dû tant en principal qu'intérêts. (*Prév.*, p. 80.)

TUTELLE.

CONSEIL SUPÉRIEUR, Québec, 9 août 1728.

Sur requête de PIERRE GRATIS, tendante à être déchargé de la tutelle des enfants mineurs du second lit de feu JEANNE MICHELON, étant subrogé tuteur de ceux du premier lit, etc.

Tutelle déchargée et nouvelle ordonnée.

Vu le dit acte de tutelle du vingt du mois de juillet dernier, le Conseil, attendu que le dit Gratis est subrogé tuteur des enfants mineurs issus du premier mariage du dit Michelon, a déchargé et décharge le dit Gratis de la dite tutelle ; et, en conséquence, ordonne qu'il sera procédé à une nouvelle élection de tutelle aux mineurs du second lit du dit Michelon, par-devant le lieutenant général de la Prévosté de cette ville. (*Con. S.*, p. 10.)

RESPONSABILITE.—DOMMAGES.

CONSEIL SUPÉRIEUR, Québec, 9 septembre 1732.

CHARLES NORMAND, Appelant, et THÉRÈSE LAJOUE, veuve MORVILLE, Intimée.

Abandon d'une chèvre pour les dommages qu'elle a faits.

Vu la sentence rendue en la Prévosté de cette ville, le 20 de mai dernier, par laquelle, sans avoir égard à l'abandon fait par l'Appelant, et, attendu le dommage que la chèvre a fait, le lieutenant général de la Prévosté a homologué le procès-verbal fait par les arbitres, et, en conséquence, le dit Appelant est condamné à paye rà l'Intimée la somme de cinquante-deux livres dix sols, et aux dépens liquidés à quatre livres, l'expédition de la, dite sentence non comprise, etc.

Le Conseil a mis et met l'appellation et ce dont est appel au néant, émendant, décharge l'Appelant des condamnations portées par la dite sentence ; et, attendu l'abandon fait par le dit Appelant, de la chèvre en question, a mis les parties hors de cour. (*Con. S.*, p. 16.)

DOUAIRE.—PRECIPUT.

CONSEIL SUPÉRIEUR, Québec, 4 juillet 1735.

SIMON LAPOINTE, marchand, etc....Appelant ; MARIE THÉRÈSE DAMOUR DEPLEINE, veuve BONDY, Intimée.

Arrêt qui ordonne qu'un douaire et préciput seront mis à contribution au sol la livre.

" Vu la sentence de cette Prévosté du 22 avril 1734, dont " est appel, par laquelle, faute par l'Appelant d'avoir satisfait " à la sentence d'appointement, le lieutenant général l'a dé- " claré forclos de plein droit, et a déclaré exécutoire son con- " trat de mariage contre Mlle Gatineau Duplessis, veuve de " Jacques Bondy, au nom et comme héritière sous bénéfice " d'inventaire du dit Bondy son fils, ordonné pour cet effet " qu'il sera fait délivrance à l'Intimée de la somme de six " mille livres, pour son douaire préfix, et que cette somme " sera placée en fonds sûrs, pour en recevoir sa vie durante, " celle de trois cents livres de rente par chacun an, avec les " arrérages du dit douaire, à compter du décès du dit Bondy, " jusqu'au jour de la délivrance du dit douaire ; ordonné en " outre qu'il lui sera payé la somme de quinze cents livres pour " son préciput, et qu'il lui sera fourni un lit et chambre gar- " nie, conformément à son dit contrat de mariage, ainsi que la " somme de trois cents livres pour son deuil, et au surplus or- " donné que la vente commencée des effets de la succession du " dit feu Bondy, serait continuée, et que sur les deniers qui " en proviendraient l'Intimée toucherait la somme de mille " livres pour la mettre en état de subsister ; de laquelle " somme il serait tenu compte par elle sur ses droits et préten- " tions." Le Conseil a mis et met l'appellation et sentence dont est appel au néant, émendant, ordonne que la vente commencée des effets de la succession du dit défunt Jacques Douaire Bondy sera continuée, que sur les deniers provenant d'icelle, et de celle déjà faite, les frais d'apposition de scellés, d'inventaire et des dites ventes, comme aussi les frais funéraires, ensemble le deuil de la dite Dlle Damour, veuve du dit Bondy, seront prélevés en entier, par privilège, et sans contribution ; lequel deuil le Conseil a modéré à la somme de cent cinquante livres ; et attendu le cas de confiture articulé par le dit Lapointe, le Conseil ordonne que la dite Dlle veuve Bondy, tant pour les six mille livres de douaire que pour les quinze cents livres de préciput, dont la reprise lui est seulement accordée par son contrat de mariage avec le dit défunt Douaire Bondy, et le dit Lapointe pour ce dont il est créancier du dit défunt Douaire, tant à cause de la société qui a été entre eux qu'à cause des envois particuliers par lui faits au dit défunt Douaire, le tout

liquidé par les arrêtés de compte du cinq mars dernier, toucheront par contribution, au sol la livre, au prorata des dites créances, le surplus des deniers provenant des dites ventes; que les deniers qui reviendront par la dite contribution à la dite Dlle Damour, veuve Douaire, pour raison du dit Douaire de six mille livres seront employés à un fonds, du revenu duquel la dite veuve jouira sa vie durante, au dit titre de douaire, et lequel fonds, après son décès, sera remis et délivré au dit Lapointe; sur et tant moins, ou jusqu'à due concurrence de ce dont il restera à satisfaire des créances ci-dessus; qu'en attendant que la dite vente soit parachevée et la dite contribution faite, et par manière de provision, la dite veuve sera payée, sur les premiers et plus clairs deniers de la dite succession, de la somme de cinq cents livres, desquelles cinq cents livres elle tiendra compte sur ses droits. (*Con. S.*, p. 24.)

TIERS-SAISIE.

CONSEIL SUPÉRIEUR, Québec, 5 décembre 1735.

JACQUES CORRIVAUX, receveur des rentes de la seigneurie de Berthier, Appelant, et FRANÇOIS LEVASSEUR, curateur de la succession vacante de feu Sr de FRONTIGNY, Intimé.

Tiers-saisi déchargé, faute de signification de la sentence intervenue sur la saisie faite en ses mains aux Défendeurs.

" Vu la sentence du 17 octobre dernier, par laquelle attendu que le dit Appelant convient qu'il s'est dessaisi des deniers " qu'il avait entre ses mains, ce qu'il n'a dû faire au préjudice " de la saisie faite entre ses mains, et de la sentence rendue " sur icelle qui l'a déclarée bonne et valable, le dit Appelant " est condamné en son propre et privé nom à payer au dit " Intimé, la somme de trois cent soixante-quatre livres dix-" sept sols, cause de la saisie."

Le Conseil, attendu le défaut de signification de la sentence du six septembre dernier, à personne ou domicile des sieur et dame de Rigauville, a mis et met l'appellation et ce au néant, émendant, décharge, quant à présent, le dit Corrivaux de la condamnation portée par la dit sentence, et en conséquence déclare la dite saisie et exécution nulle, sauf ensuite de la signification de la dite sentence du dit jour six septembre dernier, au dernier domicile des dits sieur et dame de Rigauville, à se pourvoir par le dit Intimé contre le dit Appelant par les voies de droit, pour la délivrance des deniers saisis. (*Con. S.*, p. 25.)

VENTE.—GARANTIE.—HYPOTHEQUE.

CONSEIL SUPÉRIEUR, Québec, 8 avril 1737.

PIERRE DUPRAC, Appelant, et JOACHIM GIRARD, Intimé.

Arrêt qui condamne l'Intimé à purger les hypothèques sur le bien qu'il a vendu à l'Appelant.

" Vu la sentence de cette Prévosté du premier avril 1735, " dont est appel, par laquelle il est donné acte au dit Girard " du consentement par lui donné, que le terrain qu'il a vendu " au dit Prat, et pour lequel le fonds est encore dû au dit Girard, " soit chargé de la portion de rente due à la succession du feu Sr " Aubert de Lachenaie, sur le terrain et maison vendus au dit " Prat, en conséquence duquel consentement ; et ayant égard à " la demande judiciairement faite à l'audience par le dit " Girard, le nommé Aisné condamné à lui payer la rente de " quarante livres pour le prix de l'emplacement à lui vendu. "

Le Conseil a mis et met l'appellation et ce au néant, émendant, ordonne que le dit contrat de vente sera exécuté selon sa forme et teneur, et en conséquence que le dit Intimé sera tenu de purger les hypothèques de la maison en question, et jusqu'à ce que les soixante-quinze livres de rente dues par chaque année par le dit Appelant au dit Intimé, ensemble les arrérages d'icelle, seront consignées. *(Cons. S.*, p. 28.)

VERIFICATION D'ECRITURES.

CONSEIL SUPÉRIEUR, Québec, 17 juin 1737.

FRANÇOIS ROUILLARD et autres, Appelants, et NOEL LEVASSEUR, Intimé.

Arrêt confirmant la procédure sur vérification d'une signature par comparaison d'écritures.

" Vu l'ordonnance du lieutenant général de cette Prévosté " du cinq de ce mois, dont est appel, par laquelle il est donné " acte aux parties de leurs comparutions, dires et réquisitions, " et sans avoir égard aux raisons alléguées par le dit Delorme " ès noms, ordonné qu'il serait procédé à la vérification de la " signature apposée au bas du reçu donné par feu Jean Rouil- " lard au dit Intimé, sur les pièces de comparaison rapportées " par le dit Levasseur, et à l'instant les dits Baudouin et Mo- " reau, après avoir par eux prêté serment devant les dites par- " ties, et avoir examiné la signature apposée au bas du dit " reçu et celles apposées au bas des pièces de comparaison " représentées, ont dit qu'ils croient, sans difficulté, après un

" mûr examen des caractères de signatures de comparaison, " lettres par lettres et liaisons, avec celles apposées au bas de " reçu sur le livre représenté, que les signatures ont été faites " de la même main, ce qu'ils certifient en leurs âmes et consci- " ences être véritable. "

Le Conseil a mis et met l'appellation au néant, ordonne que ce dont est appel sortira son plein et entier effet. (*Cons. S.*, p. 30.)

OBLIGATION CONDITIONNELLE.

CONSEIL SUPÉRIEUR, Québec, 14 octobre 1737.

CLAUDE DENIS, sieur de BONNAVENTURE, Appelant, et HENRY HICHÉ, procureur du Roi, Intimé.

Arrêt confirmant une opposition à une sentence par défaut, et déchargeant l'Intimé du paiement d'un mandat par lequel il "*priait un tiers, au cas qu'il lui arrivât accident dans un voyage qu'il allait faire, de payer à l'Appelant une somme d'argent qu'il lui devait.*" (1)

Vu la sentence de cette *Prévosté* dont est appel, par laquelle " l'Intimé est reçu opposant à l'exécution de la sentence par " défaut contre lui obtenue le 4 septembre 1719, et faisant " droit sur la dite opposition, le dit Intimé est déchargé de la " condamnation contre lui prononcée par la dite sentence, " attendu la forme du billet ou mandat dont il s'agit, en affir- " mant néanmoins, par lui, que lorsqu'il a fait le dit billet ou " mandat en faveur de feu Sr de Bonnaventure, il ne lui a " fait que par pure libéralité, et au cas qu'il lui fût arrivé " accident de mort dans le voyage qu'il allait faire à la Marti- " nique, et enfin qu'il ne lui devait pas la somme d'onze cent " quatre-vingt livres, y contenue." (2)

Vu aussi le billet ou mandat fait par l'Intimé le 8 décembre 1709, conçu en ces termes : " Je prie *M. de Subercasse*, gouver- " neur de l'*Acadie*, au cas qu'il m'arrivât accident dans le " voyage que je vais faire à la Martinique, de payer à *M. de* " *Bonnaventure* onze cent quatre-vingt livres que je lui dois ;" le dit billet signifié au dit Intimé dès le 12 septembre 1720, et les autres pièces sur lesquelles la dite sentence dont cet appel est intervenue ; le Conseil a mis et met l'appellation au néant ; ordonne que ce dont est appel sortira effet (*Cons. S* p. 31.)

(1) V. art 1079 C. C.

(2) V. art. 1254 C. C., et 448 C. P. C.

REBELLION A JUSTICE.

CONSEIL SUPÉRIEUR, Québec, 25 novembre 1737.

JOSEPH NORMAND, accusé de rébellion à justice, Appelant, et FRS CLESSE et PRE COURTIN, huissiers accusateurs, Intimés.

Arrêt sur rebellion à justice, avec aumône, dommages, intérêts et dépens. (1)

" Vu la sentence de la Prévosté de cette ville du dix-neuf " de ce mois, dont est appel, par laquelle le dit Normand père, " est duement atteint et convaincu d'avoir fait rébellion aux " huissiers Clesse et Courtin, faisant les fonctions de leur " emploi, de les avoir empêchés de le faire, menacé de les faire " sortir à coup de bâton, s'ils persistaient à vouloir faire leur " exécution, d'avoir le dit Normand été chercher une hache " dont il a porté un coup au dit Clesse, qui lui aurait abattu " l'épaule, s'il ne l'avait paré avec sa main; pour réparation " de quoi, ordonne que le dit Normand père sera mandé en " la chambre criminelle de la Prévosté au premier mardi, jour " d'audience, les juges y étant, pour être admonesté en leur " présence, lui est fait défense de récidiver ni d'user de pareilles " voies de fait, à peine de punition corporelle, et est condamné " en cent livres de dommages et intérêts envers les dits Clesse " et Courtin, en quinze livres d'aumône applicable aux pau- " vres de l'hôpital général de cette ville, et aux dépens du " procès, liquidés à quarante-sept livres treize sols, ce qui sera " exécuté par emprisonnement de sa personne, et que le " jugement sera lu, publié et affiché dans les carrefours de la " haute et basse ville, afin que personne n'en ignore."

Le Conseil a mis et met l'appellation et ce au néant, émendant pour les cas résultants du procès, enjoint au dit Appelant, d'être à l'avenir plus circonspect, le condamne en quinze livres d'aumône applicable à l'hôpital général de cette ville, en trente livres de dommages et intérêts envers les Intimés; lui fait défense de récidiver sous plus grande peine. (*Con. S.*, p. 32.)

(1) V. arts. 9 et 2273 C. C.

MUR MITOYEN.

CONSEIL SUPÉRIEUR, Québec, 7 juillet 1738.

NICOLAS BOISSEAU, greffier, Appelant, et MARIE-ANNE HUBERT, veuve LECOURT, et MARIE RENÉ FREROT, veuve QUERY, Intimées.

Arrêt au sujet d'un mur de séparation. (1)

" Vu la sentence de cette Prévosté du cinq de ce mois, dont " est appel, par laquelle le dit Appelant est renvoyé de sa " demande.

Le Conseil a mis et met l'appellation et ce au néant, émendant, ordonne que les Intimées seront tenues de fournir neuf pouces de terrain pour l'édification du mur de séparation de trois pieds deux pouces d'épaisseur que le dit Appelant entend faire construire, et de contribuer à l'édification d'icelui à proportion de la largeur des dits neuf pouces, jusqu'à la hauteur de dix pieds seulement. (*Con. S.*, p. 33.)

TUTELLE.

CONSEIL SUPÉRIEUR, Québec, 22 février 1740.

LOUIS FORNEL, négociant, Appelant de l'acte émané de la Prévosté de cette ville du 22 janvier dernier, par lequel il est nommé tuteur *ad hoc* aux enfants mineurs issus du mariage de Louis Gosselin et de feue Marguerite Duroi, attendu l'absence du dit Gosselin de cette colonie, et Mtre EUSTACHE LANOUILLIER DE BOISCLER au nom et comme ayant épousé dame Marguerite Duroi, Intimé.

Tuteur déchargé de tutelle à cause qu'il a cinq enfants vivants. (2)

"Vu le dit acte du jour, vingt-deux janvier dernier," le Conseil a mis et met l'appellation et ce au néant, émendant, a déchargé le dit Fornel de la dite tutelle, attendu qu'il a cinq enfants vivants; en conséquence, ordonne qu'il sera procédé à une nouvelle élection de tuteur en la manière accoutumée. (*Con. S.*, p. 36.)

(1) V. art. 520 C. C.

(2) V. art. 277 C. C.

CURE.

CONSEIL SUPÉRIEUR, Québec, 14 novembre 1740.

LOUIS FRANÇOIS SOUPIRAN, prêtre missionnaire au Château-Richer, Appelant, et ROGER LECHASSEUR, prêtre de ce diocèse, Intimé.

Arrêt relativement à deux curés réclamant la cure du Château-Richer.

Vu la sentence de cette Prévosté, dont est appel, par laquelle, attendu qu'il n'est apparu aucune démission de la part du dit Intimé, il est maintenu dans la possession et jouissance de la cure de la dite paroisse de la Visitation du Château-Richer, de laquelle il a été bien et canoniquement pourvu par ses provisions du 3 février 1728, duement insinuées : et à cet effet ordonné que dans quinzaine du jour de la signification de la dite sentence le dit Appelant sera tenu de se retirer de la dite cure, et d'en laisser la libre possession et jouissance au dit Intimé, sous les peines portées par l'ordonnance ; les dépens néanmoins compensés, etc.

Vu aussi copie collationnée des provisions de la cure de Notre-Dame de la Visitation du Château-Richer accordées au dit Intimé le 3 février 1728, ensuite desquelles est l'acte de prise de possession de la dite cure, en date du neuf du dit mois de février, les dites provisions insinuées par Mtre Barbel, greffier de l'officialité, le 6 mars de la dite année 1728, ensemble le dit acte de prise de possession, la dite collation, en date du 28 octobre dernier, signée Mouisset, le tout signifié à la requête du dit Intimé au dit Appelant, le 31 du dit mois, le mandement du sieur Miniac, archidiacre et vicaire général de ce diocèse, au dit Intimé, du 22 du dit mois, et les délibérations du chapitre de la cathédrale de cette ville, en date des 22, 24 et 27 du dit mois d'octobre dernier, ouies les parties comparantes, ensemble le procureur général du Roi ; le Conseil a mis et met l'appellation au néant, émendant, a renvoyé le dit sieur Lechasseur de sa demande. (*Cons. S.*, p. 38.)

APPEL COMME D'ABUS.—MARIAGE.

CONSEIL SUPÉRIEUR, Québec, 12 juin 1741.

MARIE-ANNE BAUDOUIN Vve Rouville, Appelante comme d'abus du mariage de son fils mineur, et le SR de Rouville, mineur, la DLLE ANDRÉ et le SR ANDRÉ DELEIGNE, lieutenant-général, Intimés.

Procédures pour abus dans la célébration d'un mariage.

Le Conseil a reçu et reçoit le procureur général du Roi Appelant comme d'abus de la dispense des trois bancs accordée par le dit vicaire général du diocèse de cette ville, au dit sieur de Rouville, mineur, pour épouser la Delle André, fille majeure, tient le dit appel pour bien relevé, et faisant droit tant sur icelui que celui de la dame veuve de Rouville, mère et tutrice du dit Sr de Rouville, mineur, de la célébration du dit mariage, dit qu'il a été mal, nullement et abusivement procédé et célébré; déclare le dit mariage non valablement contracté, fait défense au dit Sr de Rouville et à la dite Dlle André de prendre la qualité de mari et de femme, et de se hanter et fréquenter sous les peines de droit ; déboute les dits Sr et Delle André de leur demande en réparation portée tant par leur requête du deux de ce mois que par leur acte du sept de ce dit mois de restriction de la dite requête, et les condamne solidairement en tous les dépens de la plainte et appel comme d'abus envers la dite Dame de Rouville ; faisant droit sur le réquisitoire du dit procureur général du Roi, fait défense à tous notaires de passer des contrats de mariage de mineurs, que les dits mineurs ne soient duement assistés et autorisés de leurs pères, mères, tuteurs et curateurs, qui signeront aux dits contrats, ou qu'en vertu de procuration en bonne et due forme des dits pères, mères, tuteurs ou curateurs, dont la minute ou expédition demeurera anexée au dit contrat, sans pouvoir par les dits notaires recevoir seulement ni la déclaration des dits mineurs de se porter fort de leurs dits pères, mères, tuteurs ou curateurs, ni leur promesse de leur faire agréer, approuver et ratifier le dit contrat de mariage (1), enjoint au vicaire général du diocèse de cette ville et à tous autres vicaires généraux d'observer les ordonnances et constitutions canoniques concernant la publication et dispense des bans, laquelle dispense ne pourra être accordée pour marier des mineurs, sans le consentement des pères et mères, tuteurs ou curateurs, ou qu'il n'y ait un jugement rendu en connaissance de cause sur les oppositions, ou défaut de consentement des dits pères et mères, tuteurs ou curateurs (2), enjoint pareille-

(1) V. art. 119 C. C.

(2) V. art. 57, 58, 130, 131, 132, 133 et 134 C. C.

ment à tous curés et prêtres tant séculiers que réguliers de marquer dans les actes de célébration de mariage si les contractants sont enfants de famille, en tutelle ou curatelle, ou en la puissance d'autrui, d'y énoncer pareillement les consentements de leurs pères et mères, tuteurs ou curateurs, ou jugements rendus sur les dites oppositions, ou défaut de consentement, et d'y faire appeler et assister, non pas seulement deux témoins, mais quatre témoins, suivant les ordonnances, édits, déclarations et règlements (1), ordonne qu'en conformité des articles VIII et IX de la déclaration du Roi du 9 avril 1736 les actes de célébration de mariage seront inscrits sur les registres de l'église paroissiale du lieu où le mariage sera célébré, et en cas que pour des causes justes et légitimes il ait été permis de le célébrer dans une autre église, ou chapelle, les registres de la paroisse dans l'étendue de laquelle la dite église ou chapelle seront situées, seront apportés lors de la célébration du mariage pour y être l'acte de la dite célébration inscrit; fait défense d'écrire et signer, en aucun cas, les dits actes de célébration, sur des feuilles volantes (2) à peine d'être procédé extraordinairement contre le curé et autre prêtre qui aurait fait les dits actes, lesquels seront condamnés en telle amende, ou autre plus grande peine qu'il appartiendra, suivant l'exigence des cas, et à peine contre les contractants de déchéance de tous les avantages et conventions portés par le contrat de mariage, ou autres actes, même de privation d'effets civils, s'il y échet; et sera le présent arrest lu et publié, l'audience tenante, et enregistré aux greffes de la Prévosté de cette ville et des juridictions des Trois-Rivières et de Montréal; enjoint aux substituts du procureur général du Roi d'en certifier le Conseil dans les délais ordinaires. (*Con. S.*, p. 40.)

RENTE CONSTITUEE.

CONSEIL SUPÉRIEUR, Québec, 27 novembre 1741.

JEAN CLAUDE LOUET, fils, Appelant de sentence entre MARIE LISSE veuve DAVAINE, et ANNE MORIN veuve LOUET, Intimée.

Arrêt confirmatif d'une sentence portant remboursement d'une somme constituée faute de paiement de la rente. (3)

"Vu la sentence de la Prévosté de cette ville du dix-sept " d'octobre dernier, dont est appel, la dite veuve Louet et le

(1) V. art. 64 et 65 C. C.

(2) V. art. 39 et suivants C. C.

(3) V. art. 1790 C. C.

" dit Appelant sont condamnés à payer à la dite Intimée, la " somme de trois cent soixante-dix-sept livres, qu'ils doivent, " pour arrérages de rente de la somme de deux mille quatre cents " livres de principal portée en leur reconnaissance des 11 novem- " bre 1739 et 1740, et faute par eux de payer les dits arrérages de " rente échus, condamnés au remboursement de la dite somme " de deux mille quatre cents livres de principal, et aux intérêts " d'icelle du jour de la demande, jusqu'à l'actuel payement."

Le Conseil a mis et met l'application au néant, ordonne que ce dont est appel sortira son plein et entier effet. (*Con. S.*, p. 41.)

PROCEDURE.—ACTION.—PROCURATION.

CONSEIL SUPÉRIEUR, Québec, 17 octobre 1742.

JEAN URBAIN MARTEL DE BELLEVILLE, stipulant par le Sr Jean Dumont, son procureur fondé, Appelant, et MICHEL PETRIMOULT, Intimé.

Arrêt déclarant les pouvoirs de l'Appelant suffisants pour poursuivre l'action, et renvoie les parties en la Prévosté pour faire droit au fonds. (1)

" Vu la sentence rendue en la Prévosté de cette ville le dix " de ce mois, dont est appel, par laquelle, attendu que les Srs " Dumont et Nouette ne sont point fondés de pouvoir spécial " pour former aucune action contre le dit Petrimoult, l'Intimé " est renvoyé de l'action contre lui intentée."

Vu aussi le compte d'arbitrage ensuite duquel est la sentence arbitrale du 25 septembre 1740, et l'arrest du dernier octobre au dit an, ensemble la procuration passée devant Rageot, notaire, et témoins, le onze juillet dernier ; le Conseil a mis et met l'appellation et ce au néant, émendant, a déclaré les pouvoirs du dit sieur Dumont suffisants, en conséquence a renvoyé les parties sur le fonds en la Prévosté de cette ville pour y être fait droit ainsi qu'il appartiendra ; sauf l'appel au conseil, si le cas y échet. (*Con. S.*, p. 44.)

(1) V. art. 19 C. P. C.

TUTELLE.

CONSEIL SUPÉRIEUR, Québec, 19 novembre 1742.

JEAN VALIN, tuteur nommé à CHARLOTTE DUBREUIL, fille mineure, Appelant, et JOSEPH DELORME, subrogé tuteur de la dite mineure, Intimé.

Tutelle déclarée nulle, le tuteur n'ayant point été appelé à l'assemblée, et à cause en outre qu'il a six enfants vivants. (1)

" Vu la sentence de cette Prévosté du neuf de ce mois, dont " est appel, par laquelle il est ordonné, sans avoir égard à la " défense du dit Appelant, que, conformément à l'acte de " tutelle, il demeurera tuteur à la dite mineure Dubreuil, et " que la dite tutelle courra à ses risques du jour de la nomina- " tion faite de sa personne."

Le Conseil a mis et met l'appellation et ce au néant, émendant, a déclaré l'acte de nomination de tutelle nul, le dit Valin ayant été nommé tuteur par le dit acte, sans avoir été présent ni assigné ; ordonne qu'il sera procédé à une nouvelle élection de tuteur à la dite mineure, sans que les officiers de la Prévosté de cette ville puissent exiger aucun nouvel émolument, à laquelle élection le dit Valin pourra être appelé, mais ne pourra être nommé tuteur, attendu qu'il a six enfants vivants ; dépens compensés. *(Cons. S.*, p. 45.)

INJURE ECRITE.—REPARATION D'HONNEUR.

CONSEIL SUPÉRIEUR, Québec, 22 avril 1743.

AUGUSTIN SIMARD, Appelant, et MICHEL COTTON, Intimé.

Arrêt confirmant une sentence pour réparation d'honneur. (2)

" Vu la sentence rendue en cette Prévosté le vingt de mars " dernier, dont est appel, par laquelle, ayant égard à la deman- " de incidente du dit Intimé, portée par ses défenses, le dit " Appelant est condamné à faire au dit Intimé une réparation " d'honneur, en présence de telles personnes qu'il voudra choi- " sir, comme il reconnaît le dit Intimé pour personne de bien " et d'honneur, et non taché de l'injure dont il l'a accusé, et ce " par-devant Mtre Vaucourt, notaire, dont il sera dressé acte, et " en l'étude duquel le dit Appelant sera tenu de comparoir à " la première sommation qui lui en sera faite, sous telles peines " qu'il appartiendra : ordonné que les termes injurieux portés

(1) V. art. 272 et 277 C. C.

(2) V. art. 1053 et 1065 C. C.

tant dans la requête du dit Appelant que dans ses autres " écrits seront rayés et biffés, est fait défense au dit Appelant " de plus à l'avenir récidiver sous les peines de droit ; et pour la calomnieuse accusation par lui formée contre le dit Intimé, le dit Appelant est condamné en vingt livres d'amende, applicables aux sœurs de la Congrégation de cette ville : ordonné que la dite sentence sera lue, publiée, et affichée ès- " lieux ordinaires."

Le Conseil a mis et met l'appellation au néant, ordonne que ce dont est appel sortira effet, et cependant a modéré l'amende de vingt livres à trois livres. (*Con. S.*, p. 45.)

TIERS-SAISIE.—NANTISSEMENT.

CONSEIL SUPÉRIEUR, Québec, 12 juin 1743.

ELIZABETH PRAT, femme de MERCIER, absent, Appelante, et MICHEL PETRIMOULT, négociant, Intimé.

Arrêt qui décharge un tiers-saisi condamné par défaut comme débiteur personnel (1) et ordonne la vente d'effets donnés en nantissement.

" Vu la sentence rendue en cette Prévosté le trois de mai " dernier, dont est appel, par laquelle l'Appelante, faute par " elle d'être venue faire à l'audience l'affirmation qu'elle était " tenue de faire sur la saisie faite entre ses mains sur le sieur " Nouette, est déclarée débitrice des causes de la saisie, et " comme telle condamnée à payer à l'Intimé la somme de quatre " cent soixante-dix livres quatorze sols un denier."

Le Conseil, en émendant, a donné acte à l'Intimé de la déclaration de l'Appelante par écrit du onze de ce présent mois et d'elle signée, de la somme de quatre cent cinq livres à elle due par le dit Nouette, et des hardes et effets qu'elle a à lui appartenant, en nantissement de la dite somme, consistant en (suit désignation des effets) ; et après que l'Appelante a affirmé, par-devant le Conseil, la dite déclaration véritable, icelle paraphée, *ne varietur* ; ordonne le Conseil, que les dits hardes et effets, reconnus pris en nantissement par l'Appelante, seront vendus en la manière accoutumée, le dit Nouette, ou son clerc, présent ou duement appelé (2) ; et pour faire déclarer la dite saisie bonne et valable avec le dit Nouette, et voir ordonner avec lui la vente et délivrance des deniers en provenant, a renvoyé les parties en la Prévosté. (*Con. S.*, p. 46.)

(1) V. art. 624 C. P. C.

(2) V. art. 1971 C. C.

BAIL.—CAUTIONNEMENT.

CONSEIL SUPÉRIEUR, Québec, 3 août 1744.

JOSEPH FORTIER, fermier, Appelant, et JACQUES GOURDEAU, seigneur, etc., Intimé.

Arrest qui décharge de fournir caution sur un bail à ferme, telle qu'ordonnée par sentence.

" Vu la sentence rendue en la Prévosté de cette ville le quatorze de juillet dernier dont est appel, par laquelle il est ordonné que le bail fait entre les parties, passé devant Pichet, notaire, le quinze avril dernier, sera exécuté selon sa forme et teneur ; et ayant égard à la demande du dit Intimé, ordonne que le dit Appelant, pour jouir de l'effet du dit bail, sera tenu dans huitaine pour tout délai, de donner bonne et suffisante caution pour sûreté du contenu au dit bail, laquelle caution il présentera au greffe de la Prévosté, sinon, et le dit temps passé, sans qu'il soit besoin d'autre jugement, permis au dit sieur Gourdeau de rentrer dans la possession et jouissance de la terre par lui affermée, d'autant que c'est lui qui a fourni les labours et semences ; à l'effet de quoi le dit bail sera résilié, le dit Appelant condamné, en cas qu'il présente la dite caution, à remettre au dit Intimé aussitôt après la récolte dix minots de blé, pour sa moitié de la semence, six minots et demi de pois, comme aussi à rendre quatre-vingt-deux livres de farine, quatorze livres de lard, une marmite de fer, deux paires de traits, une peau de loup marin tannée, et une barrique vide, ou à lui payer, pour la valeur de toutes ces choses, la somme de quatre-vingt-treize livres ; est fait défense au dit Appelant de plus à l'avenir se servir de mauvais termes injurieux, ni maltraiter le dit Intimé, sous peine d'amende arbitraire et de plus grande peine, si le cas y échet. "

Le Conseil a mis et met l'appellation et ce au néant, en ce que l'Appelant est condamné à donner caution, et faute par lui de la donner, que le dit bail sera résilié, émendant, quant à ce, a débouté l'Intimé de sa demande de caution, ordonne que le dit bail sera exécuté selon sa forme et teneur : après avoir pris de l'Intimé l'affirmation à lui déférée par l'Appelant qu'il n'a point reçu les articles contestés par le dit Appelant, condamne purement et simplement le dit Appelant à remettre au dit Intimé, aussitôt après la récolte les dix minots de blé, les six minots et demi d'avoine, le demi-minot de pois, quatre-vingt-deux livres de farine, quatorze livres de lard, une marmite de fer, deux paires de traits, une peau de loup marin tannée, et une barrique vide, ou à lui en payer pour la valeur, la somme de quatre-vingt-treize livres, la dite sentence au résidu sortissant effet. (*Con. S.*, p. 47.)

VENTE.—GARANTIE.

CONSEIL SUPÉRIEUR, Québec, 3 août 1744.

PIERRE TROTTIER DEZAUNIER, négociant, Appelant, et ROBERT DUGARD, négociant à Rouen, stipulant pour lui les sieurs Havy et Lefêvre, Intimé.

Arrest confirmatif d'une sentence de dépouillement de factures de marchandises envoyées d'Europe, et qui déclare que le marchand qui achète des marchandises doit, lors de la livraison, et après les avoir déballées, en faire la vérification, et ne pas attendre longtemps après pour les examiner. (1)

Vu la sentence rendue en cette Prévosté le 15 décembre 1739, dont est appel, conçue en ces termes, " nous, après avoir " fait un dépouillement exact de la facture des marchandises " envoyées par le dit sieur Dugard aux sieurs Dezaunier et " Brouague, en l'année 1737, ainsi que de celles des marchan- " dises envoyées en ce pays, la dite année 1737, par les sieurs " Pacaud et Veyssière, par lequel dépouillement il paraît que " plusieurs articles compris dans les dites factures ne se rap- " portent pas tout à fait pour les prix les uns aux autres, " quoique les qualités de marchandises y contenues paraissent " être la même chose, ayant reconnu par cette vérification " qu'il y a un nombre d'articles portés dans la facture des " effets envoyés aux dits sieurs Dezaunier et Brouague par " le dit sieur Dugard qui ne se trouvent pas dans ceux des dits " Srs Pacaud et Veyssière, et ayant aussi fait attention qu'il " y a quelques marchandises portées dans la facture du Sr " Dugard de quelque chose plus chère que celles portées dans " les factures des dits Srs Pacaud et Veyssière, quoiqu'elles " paraissent de même qualité, et qu'il y en a aussi d'autres " portées à meilleur marché dans la facture du sieur Dugard " et celles portées par la facture des dits Srs Pacaud et Veys- " sière, nous ordonnons que tous les effets qui sont portés " dans la facture du dit Sr Dugard qui ont été envoyés aux " dits Srs Dezaunier et Brouague en 1737, et qu'ils ont reçus, " dont semblables et pareils effets ne se trouvent pas dans les " factures des marchandises envoyées la même année 1737, " par les dits Srs Pacaud et Veyssière, le prix des dits effets " de l'envoi du Sr Dugard soit payé par les dits Srs Dezau- " nier et Brouague aux Srs Havy et Lefêvre stipulants pour " le dit Sr Dugard de la manière et ainsi qu'ils sont portés dans " la facture du dit Sr Dugard, sans aucune dimunition ; ayant " été libre aux dits Srs Dezaunier et Brouague lors de la livrai- " son des dits effets, après les avoir déballés, de faire telle vé-

(1) V. art. 1523 et 1530 C. C.

" rification qu'ils auraient jugée à propos sur les prix et qua-
" lités, eux seuls étant intéressés à cette vérification de prix,
" n'ayant pas dû attendre, comme ils ont fait, depuis un an
" après la livraison, et qu'ils eussent vendu les dites marchan-
" dises, de faire les demandes qu'ils font aujourd'hui, et cela
" avec d'autant plus de raison qu'il ne se trouve point de pa-
" reilles marchandises dans les factures des dits Srs Pacaud
" et Veyssière ; et comme par le dépouillement qui a été fait,
" ainsi qu'on vient de le dire, des factures des dits Srs Du-
" gard, Pacaud et Veyssière, il se trouve une différence sur
" les marchandises portées en icelles, quoiquelles soient spé-
" cifiées de même espèce et qualité de la somme de quatre
" cent cinquante-cinq livres deux sols quatre deniers, sur plu-
" sieurs articles portés plus cher sur la facture du dit Sr Du-
" gard, que sur celles des dits Srs Pacaud et Veyssière qui
" doivent en fixer le prix, en conséquence du traité fait
" par les parties, dont est fait mention ci-devant, nous
" ordonnons que le dit Sr Dugard, stipulant pour lui les
" dits Srs Havy et Lefêvre tiendront compte aux dits Srs
" Dezaunier et Brouague de la dite somme de quatre cent
" cinquante-cinq livres deux sols quatre deniers, sur celle de
" deux mille sept cent quatre-vingt-six livres quatorze sols
" quatre deniers, que les dits Srs Dezaunier et Brouague
" doivent au dit Sr Dugard stipulant pour lui, comme dit est,
" les dits Srs Havy et Lefêvre ; en conséquence de quoi, nous
" condamnons les Défendeurs à payer au dit Sr Dugard, sti-
" pulant pour lui les sus-nommés, la somme de deux mille
" trois cent trente-une livres douze sols, et aux intérêts jus-
" qu'au parfait payement, déduction faite de quatre cent cin-
" quante-cinq livres deux sols quatre deniers."

Le Conseil a mis et met l'appellation au néant ; ordonne que ce dont est appel sortira son plein et entier effet. (*Con. S.*, p. 48.)

DECRET.—ADJUDICATAIRE.

CONSEIL SUPÉRIEUR, Québec, 1er décembre 1744.

LOUIS FOURNEL, négociant, Appelant, et EUSTACHE LAMBERT DUMONT, etc., Intimé.

Arrest déchargeant un adjudicataire de la consignation au greffe du prix de son adjudication, à la charge d'en payer l'intérêt. (1)

" Vu la sentence rendue en la Prévosté de cette ville, le
" neuf septembre dernier, dont est appel, par laquelle il est
" ordonné que sous vingt-quatre heures, le dit Appelant, au

(1) V. art. 688 C. P. C.

" nom d'adjudicataire de la terre et habitation vendues sur " J.-Bte Larchevêque Grandpré, consignera au greffe de la " Prévosté, le prix de son adjudication, sinon, et à faute de ce " faire, la terre et habitation en question, sera vendue à sa " folle enchère, les dépens compensés, lesquels le dit Intimé " pourra joindre à sa créance, etc.. "

Le Conseil a mis et met l'appellation et sentence dont est appel au néant, émendant, sans s'arrêter à la demande de l'Intimé, ordonne que le prix de l'adjudication dont il s'agit demeurera entre les mains de l'Appelant jusqu'au jour de la sentence d'ordre et distribution du dit prix, à la charge de payer les intérêts, que le Conseil condamne l'Appelant d'en payer à compter du jour de l'adjudication, jusqu'à celui de la signification qui lui sera faite de la dite sentence d'ordre et distribution du dit prix et intérêt d'icelui, et à la charge aussi de payer par le dit Appelant, dans le même jour de la signification de la dite sentence d'ordre, à chacun des créanciers utilement colloqués, aussi ce qui leur aura été adjugé, sinon et à faute de ce faire dans le dit jour, que l'Appelant y sera contraint par toutes voies, même par corps, en vertu du présent arrest, sans qu'il en soit besoin d'autre ; dépens compensés, et sera l'Appelant remboursé du coût du présent arrest sur le prix de la dite adjudication. (*Con. S.*, p. 50.)

RETRAIT LIGNAGER.

CONSEIL SUPÉRIEUR, Québec, 15 février 1745.

JOSEPH MARIE FAGOT, Appelant, et CHARLES TURPIN, Intimé.

Arrest sur un retrait lignager, declarant que le retrayant doit offrir les *loyaux coûts*. (1)

" Vu la sentence de la Prévosté de cette ville, du vingt-deux " décembre dernier, dont est appel, et attendu que, dans l'ex- " ploit du dix-huit novembre dernier, portant que l'Intimé " soit condamné à abandonner et délaisser au dit Appelant, " par retrait lignager, la portion de terre, circonstances et " dépendances, dont est question, il a été omis dans les offres " énoncées au dit exploit ces mots, *loyaux coûts*, lesquels sont " essentiels, et de rigueur en matière de retrait, le dit Appelant " est débouté du retrait en question."

Le Conseil a mis et met l'appellation au néant, ordonne que ce dont est appel, sortira son plein et entier effet. (*Con. S.*, p. 52).

(1) V. art. 710 C. C.

CANAL.—EXPERTISE.

CONSEIL SUPÉRIEUR, Québec, 29 juillet 1748.

JOSEPH DAMOUR, Ecuier, SR DEPLEINE et SR HENRY DUSAUTOY, Appelants, et le SR PIERRE JEHANNE, Intimé.

Arrest confirmatif d'une expertise pour un canal à être construit.

" Vu la sentence de cette Prévosté rendue le deux de ce " mois, entre le dit Sr Jehanne, le dit Sr DePleine, Dusautoy, " André Goupille, Jean-Bte De Rouvray et le Sr Ferrant, par " laquelle il est ordonné que, par experts, dont les parties con- " viendront, sinon nommés d'office, il sera procédé à la visite " du canal du dit Sr Jehanne, qu'il entend faire conduire jus- " qu'à la grève, pour faciliter l'écoulement des eaux, lesquels " arbitres constateront, par le procès-verbal qu'ils dresseront, " en présence des parties, ou elles duement appelées, serment " par eux préalablement prêté en la manière accoutumée, si " les dits sieurs DePleine et Dusautoy, Coupille, De Rouvray " et Ferrant ont quelques communications de leurs canaux à " celui du dit Sr Jehanne, s'il est nécessaire de faire la conti- " nuation demandée, et, en ce cas, pour quelle portion chacun " des dits DePleine, Dusautoy, Coupille, DeRouvray et Fer- " rant, dont les canaux auront communication, avec celui du " dit Jehanne, ils contribueront chacun à leur égard ; pour le " dit procès-verbal fait et rapporté, être ordonné ce qu'il " appartiendra."

Le Conseil a mis et met l'appellation au néant, ordonne que la sentence dont est appel sortira son plein et entier effet. (*Con. S.*, p. 57).

PROCUREUR.

CONSEIL SUPÉRIEUR, Québec, 13 février 1750.

THOMAS COTÉ, en requête, Demandeur, et ETIENNE SIMARD, sur la dite requête, Défendeur.

Procureur condamné en son propre et privé nom aux dépens d'une opposition à un arrest. (1)

Vu la dite requête, concluant " à ce que, vu l'arrest de ce " Conseil, rendu entre les parties le vingt-deux décembre der- " nier, recevoir le dit *Thomas Coté* opposant à l'exécution du " dit arrest, en conséquence, lui permettre d'intimer le dit " *Etienne Simard*, pour en venir au Conseil, dans le délai de

(1) V. art. 19 C. P. C.

" l'ordonnance, pour plaider sur la dite opposition, voir dire et " ordonner que le dit *Coté* sera reçu, en refondant, ainsi qu'il " l'offre, les dépens de la coutumace, la dite requête signée " *Dulaurent.* "

Le Conseil a débouté le dit Thomas Coté de son opposition à l'exécution de l'arrest du vingt-deux décembre dernier ; condamne Mr *Dulaurent*, procureur du dit *Coté*, en son propre et privé nom, aux dépens de l'opposition. (*Con. S.*, p. 61.)

PREUVE.

CONSEIL SUPÉRIEUR, Québec, 11 septembre 1752.

JEAN-BAPTISTE BRIARD, cabaretier, Appelant, et Sieur PIERRE PAYÈS, négociant à Montauban, stipulant par les Srs, MATHERON et PINDARIS, Intimé.

Arrest confirmatif d'une sentence pour payement d'une dette, sur preuve du livre de compte. (1)

" Vu la sentence de la Prévosté de cette ville du vingt-neuf " d'août dernier, dont est appel, par laquelle le dit *Briard* est " condamné à payer au dit Sr *Payès* la somme de onze cent " quatorze livres un sol six deniers, et aux intérêts de la dite " somme à compter du jour de la demande jusqu'à l'actuel " payement, en affirmant par le dit Sr *Pindaris* que les livres " représentés sont sincères et véritables, et qu'il y a posté sans " rien omettre les débits et crédits ; et est acte de l'affirmation " faite par le dit Sr *Pindaris*, au désir de la dite sentence.

Vu aussi le compte de débit et de crédit mentionné en la dite sentence, dont est appel ; le Conseil a mis et met l'appellation au néant, ordonne que ce dont est appel sortira son plein et entier effet. (*Con, S.*, p. 64.)

DOUAIRE.

CONSEIL SUPÉRIEUR, Québec, 26 novembre 1753.

LOUIS ENOUILLE LANOIX, tuteur des mineurs de feu JEAN DELAUNAY et d'ANGELIQUE NORMAND LABRIÈRE, Appelant, et JACQUES HERMIER et la dite LABRIÈRE, sa femme, Intimés.

Arrest qui infirme une sentence pour payement et remploi d'un douaire. (2)

(1) V. art. 1227 C. C.

(2) V. art. 1451 C. C.

" Vu la sentence rendue en cette Prévosté le vingt du pré-
" sent mois, dont est appel, par laquelle il est ordonné que dé-
" livrance sera faite au dit *Hermier*, au dit nom par *Jacques*
" *Deguise* dit *Flamant*, maître maçon de la somme de mille
" livres revenante à la dite *Angélique Normand Labrière*,
" femme du dit *Hermier*, pour son douaire à elle accordé par
" son contrat de mariage avec le dit feu *Delaunay*, son pre-
" mier mari, et comme le dit douaire est réversible aux enfants
" de son mariage avec le dit *Delaunay*, il sera fait remploi de
" la dite somme de mille livres sur un terrain et maison adju-
" gés au dit *Hermier*, par sentence du 23 octobre dernier, le
" dit terrain et maison sis près la citadelle, contenant qua-
" rante pieds de front sur quatre-vingt pieds de profon-
" deur, lesquels maison et emplacement seront et demeureront
" affectés et hypothéqués par privilège et préférence à la ga-
" rantie du dit douaire, et au moyen du payement qui sera
" fait par le dit *Flamant* de la dite somme de mille livres, il
" en sera et demeurera bien et valablement déchargé."

Vu, aussi, toutes les autres pièces sur lesquelles la dite sentence est intervenue; le Conseil a mis et met l'appelation et sentence dont est appel au néant, émendant, renvoye l'Appelant de la demande de l'Intimé, fait défense au dit *Deguise* dit *Flamant* de vider ses mains du fonds du douaire de la somme de mille livres, dont est question. (*Con. S.*, p. 65.)

MARIAGE.—MINEUR.

CONSEIL SUPÉRIEUR, Québec, 24 février 1755.

JEAN RUFFIO, négociant, Appelant, et JOSEPH RUFFIO, aussi négociant, Intimé.

Arrest ordonnant de prendre l'avis de voisins ou amis, à défaut de parents, sur un mariage projeté d'un mineur. (1)

Vu la sentence, dont est appel, rendue en la Prévosté de cette ville, le onze du présent mois, portant " sans nous arrê-
" ter à l'opposition formée par exploit du 23 janvier dernier
" de laquelle nous avons débouté le dit *Jean Ruffio*, avons,
" donné mainlevée de la dite opposition au dit *Joseph*
" *Ruffio*, lui permettons de faire publier ses bans, pour être
" ensuite procédé à la célébration de son mariage avec *Louise*
" *Cadet*; renvoyons le dit *Joseph Ruffio* du surplus de ses
" conclusions porté par son écrit de replique."

Le Conseil a mis et met l'appellation et ce dont est appel au

(1) V. art. 119 à 122 C. C.

néant, émendant, déclare la procédure nulle, comme faite par l'Intimé mineur, se prétendant majeur, et sans assistance de tuteur ni curateur; émendant, évoquant le principal, et y faisant droit, sans s'arrêter à l'opposition formée par l'Appelant à la publication des bans et célébration de mariage, qui pourraient être requises par l'Intimé, son frère, et *Louise Cadet*, a fait mainlevée de la dite opposition; ordonne que l'Intimé sera préalablement tenu, avant de procéder, et passer outre au dit mariage avec la dite *Cadet*, de faire une nouvelle assemblée de voisins ou amis, expliqué, au défaut en ce pays de parents ou alliés, faisant l'exercice de la religion catholique, apostolique et romaine, pour, avec le Sr *Frs Lemaître Lamorille*, son tuteur *ad hoc*, donner leur avis et consentement, s'il y échet, pour le mariage proposé, nommément et spécifiquement, avec la dite Louise Cadet: duquel avis et consentement sera fait mention sommaire, tant dans le contrat de mariage des dites parties que sur le registre de la paroisse où se fera la célébration du dit mariage. (*Con. S.*, p. 66.)

INJURES.

CONSEIL SUPÉRIEUR, Québec, 12 janvier 1756.

ANDRÉ LAGROIX, habitant, Appelant, et PAUL ANTOINE LANOUILLER, juge prévost de Notre-Dame-des-Anges, Intimé.

Arrest confirmatif d'une sentence pour réparation d'honneur, et injonction aux huissiers d'inscrire les réponses des parties sur les originaux et copies de significations. (1)

" Vu la sentence, dont est appel rendue en la Prévosté de " cette ville le 25 novembre dernier, par laquelle le dit *André* " *Lagroix* est condamné à faire réparation au dit *Sr Lanoullier*, au premier jour d'audience, en la juridiction de " *Notre-Dame-des-Anges*, pour les injures par lui proférées " contre le dit *Sr Lanouiller*, énoncées en sa requête des dix " et onze novembre dernier, et en cinquante livres d'amende " applicable aux pauvres de la paroisse du dit lieu de *Notre-Dame-des-Anges*; lui est fait défense de récidiver sous les " peines de droit; le dit *Lagroix* renvoyé, au surplus, à se " pourvoir en la jurisdiction de *Notre-Dame-des-Anges*, pour " raison de l'affaire pendante en la dite jurisdiction, entre lui " et le nommé *Lorty*; sauf l'appel en la dite Prévosté, si le " cas y échet, et le dit *Lagroix* condamné aux dépens liquidés " à quatorze livres quinze sols, le coût de la sentence compris,

(1) V. art. 78 C. P. C.

" et qui sera exécutée nonobstant opposition, ou appellation " quelconque, et sans préjudice d'icelles."

Vu,aussi,toutes les autres pièces sur lesquelles la dite sentence est intervenue, le Conseil a mis et met l'appellation au néant, ordonne que la sentence dont est appel sortira son plein et entier effet, et, de grâce, a réduit l'amende de cinquante livres à la somme de neuf livres, et, faisant droit sur les conclusions du procureur général du Roi, le Conseil enjoint à tous huissiers, sous peine de six livres d'amende, que lorsque les parties à qui ils feront des significations, entendront faire dans l'instant quelques réponses, de transcrire en entier les dites réponses, tant dans l'original des dites significations que dans la copie qu'ils laisseront des dites significations aux dites parties, de manière que la copie soit totalement conforme à l'original ; lesquelles réponses seront signées tant dans la copie que dans l'original, si la partie sait signer, ou qu'il sera déclaré qu'elle ne le sait, ou ne peut signer, de ce interpellée suivant l'ordonnance ; et sera le présent arrest envoyé, tant en la Prévosté de cette ville, qu'aux jurisdictions royales de *Montréal* et des *Trois-Rivières*, pour y être lu, publié et enregistré ; et seront tenus les substituts du dit procureur général du Roi, ès dites jurisdictions de tenir la main à son exécution, et de certifier le Conseil des dites publications et enrégistréments, dans les délais accoutumés. (*Con. S.*, p. 67.)

PREUVE.—SERMENT DES PARTIES.

CONSEIL SUPÉRIEUR, Québec, 10 avril 1756.

THOMAS CUGUET, comme ayant épousé Dlle MARGUERITE CHARLY, Appelant ; et PIERRE REVOL, négociant, Intimé.

Arrest infirmant une sentence qui réfère au serment une certaine promesse, à l'encontre d'actes authentiques. (1)

" Vu la sentence, dont est appel, rendue en cette Prévosté, " le six de ce mois, par laquelle il est ordonné, avant faire " droit, que le dit Sr Cuguet comparaîtra en personne, au " premier jour d'audience, pour faire sa déclaration, *s'il n'a* " *pas promis au Sr Charly d'avertir le dit Sr Revol, six* " *mois avant la demande dont est question*, auquel jour sera " fait droit tant en absence que présence."

Vu, aussi, la sentence d'adjudication faite au dit Intimé des emplacement et maison dont est question, en date du 2 mars 1751, à lui signifiée le deux de ce mois, les dits emplacement

(1) V. art. 1254 C. C.

et maison venant de la succession de défunt Sr *Jacques Charly*, et par la mise à prix énoncée en la dite sentence d'adjudication, l'adjudicataire est obligé de rembourser la somme revenante aux mineurs *Charly*, lorsqu'ils seront en majorité et pourvus par mariage; ensemble le contrat de mariage du dit Sr *Thomas Cuguet*, avec la dite Dlle *Marguerite Charly*, passé devant les notaires *royaux*, à *Montréal*, le six janvier dernier, insinué en la Prévosté de cette ville, le neuf mars dernier.

Le Conseil a mis et met l'appellation et sentence dont est appel au néant, émendant, évoquant le principal, et y faisant droit, condamne l'Intimé à payer au dit Appelant la somme de treize mille cent soixante-huit livres treize sols quatre deniers, et intérêts. (*Con. S.*, p. 68.)

USUFRUIT.—CAUTION.

CONSEIL SUPÉRIEUR, Québec, 10 avril 1756.

LOUISE BOISSEL, veuve et donataire mutuelle de feu ANTOINE GAUTHIER LAROUCHE, Appelante ; et Joseph DUFRESNE et consorts, Intimés.

Arrest infirmant une sentence, qui condamne une veuve à donner bonne et suffisante caution des biens contenus en son inventaire, et dont elle avait l'usufruit. (1)

" Vu la sentence, dont est appel, rendue en la Prévosté de " cette ville, le 25 mars dernier, par laquelle il est ordonné " que le don mutuel porté au contrat de mariage d'entre la " dite *Marie-Louise Boissel*, avec le dit feu *Antoine Gau-* " *thier Larouche*, passé devant Mtre *Pinguet*, notaire, le 22 " janvier 1736, insinué en la Prévosté de cette ville, le 3 mai " 1743, sera exécuté, suivant sa forme et teneur ; en consé- " quence, que délivrance sera faite à la dite veuve *Gauthier* " de tous les biens meubles et immeubles dépendants de sa " communauté avec le dit feu *Gauthier Larouche*, et conte- " nus en l'inventaire qu'elle en a fait faire, pour en jouir, par " usufruit, conformément au dit contrat de mariage, en par la " dite veuve *Gauthier* donnant bonne et suffisante caution de " tous les biens et effets contenus au dit inventaire, laquelle " caution sera reçue en la dite Prévosté, en la manière accou- " tumée. "

Vu, encore, le contrat de mariage de la dite Appelante avec le dit feu *Gauthier Larouche*, ci-devant daté, duement insi-

(1) V. art. 464 C. C.

nué ; le Conseil a mis et met l'appellation et sentence dont est appel au néant, au chef qui ordonne que la dite veuve *Gauthier Larouche* donnera bonne et suffisante caution, émendant, quant à ce, ordonne que la dite Appelante jouira de son don mutuel porté en son contrat de mariage, à sa caution juratoire, la sentence, au résidu, sortissant effet. (*Con. S.*, p. 68.)

OBLIGATION.—HERITIER.

CONSEIL SUPÉRIEUR, Québec, 2 avril 1759.

Les Srs Supérieur, Directeurs et Ecclésiastiques du Séminaire des Missions étrangères établi en cette ville, stipulant par Messire JACREAU, etc., Appelants ; et LOUIS SOUMANDE, négociant à Varennes, Intimé.

Arrest ordonnant l'exécution d'actes de fondation de pensionnaires au Séminaire de Québec. (1)

Vu la sentence de la Prévosté de cette ville, du 29 décembre 1758, dont est appel, prononcée en ces termes, " nous, sans " avoir égard aux conclusions subsidiaires prises par le dit " *Sr Soumande*, par sa requête du 17 novembre dernier, en ce " qui concerne le remboursement de la somme de dix-huit " mille livres, ni aux offres faites par les dits Srs du Séminaire, par leur écrit signifié le neuf décembre, ordonnons " que la sentence du 12 mars 1728, sera exécutée selon sa " forme et teneur ; en conséquence, condamnons les dits Srs " du Séminaire à recevoir, à la première présentation, le fils " du dit *Sr Soumande*, dans le Séminaire, pour y achever ses " études jusqu'à l'état ecclésiastique, faute de quoi, les condamnons, dès à présent, en vertu du présent jugement, et " sans qu'il en soit besoin d'autre, à payer quatre cent cinquante livres de pension annuelle, pour chacun des deux " enfants qu'ils doivent prendre ; et, à recevoir, dorénavant, et " à perpétuité, au dit Séminaire les deux enfants qui seront " présentés par les héritiers *Soumande*, et, à défaut de présentation des dit héritiers, par ceux à qui il appartiendra de les " présenter ; sauf à faire droit sur la capacité ou incapacité de " ceux qui seront présentés, lorsqu'il en sera question."

Encore une expédition de la sentence de la Prévosté du 12 mars 1728, rendue par défaut, contre Messire *Lyon* de *Saint-Ferréol*, prêtre, supérieur du Séminaire de cette ville, " qui le " condamne, au dit nom, à garder le fils de Mtre *François* " *Hazeur*, conseiller au dit Séminaire, pour y achever ses " études jusqu'à l'état ecclésiastique inclusivement, si mieux

(1) V. art. 13 C. P. C.

" n'aime lui payer pour sa pension annuelle, ailleurs, la somme
" de quatre cent cinquante livres, suivant l'acte de fondation ;
" condamne en outre le dit Sr *Lyon* au dit nom à recevoir
" dorénavant et à perpétuité au dit Séminaire les enfants
" que les héritiers présenteront de la famille du feu Sr *Sou-*
" *mande*, au nombre de deux, préférablement à tous autres,
" étant l'intention du dit acte de fondation fait par le dit Sr
" *Soumande*, et est le dit Sr *Lyon* condamné aux dépens."

Le Conseil a mis et met l'appellation et sentence de la Prévosté du 19 décembre 1758, dont est appel, au néant, émendant, ordonne que les actes de fondation des 17 juin 1693, 20 janvier 1795, 15 octobre 1701, et 27 septembre 1702, seront exécutés selon leurs formes et teneurs, ordonne pareillement que les dits Srs Supérieur et Directeurs du dit Séminaire de cette ville seront tenus de recevoir, à perpétuité, au dit Séminaire, pour y occuper les deux places dont est question, les enfants de la famille *Soumande* qui leur seront présentés par ceux de sa famille, et ce, préférablement à tous autres; en conséquence, condamne les dits Srs Supérieur et Directeurs à recevoir au dit Séminaire les enfants du dit Intimé, pour y faire leurs études, et y être enseignés, aux clauses, conditions et exceptions portées aux susdits contrats, jusqu'à l'état ecclésiastique inclusivement. (*Con. S.*, p. 70.)

TRIAL BY JURY.

COURT OF KING'S BENCH, Quebec, 9 February, 1810.

PRESENT: SEWELL, CH. J.

HUNT, against BRUCE and others.

Held: That, in an action upon an agreement for the sale of a cargo of coal, by a merchant, to an ironmonger and blacksmith, the trial and verdict of a jury may be obtained, under the Prov. Ord., 25 Geo. III, ch. II, s. 9. (1)

This was an action, for the non delivery of a cargo of coal, which the Defendants, who are merchants, had, as alleged in the declaration, bargained and sold to the Plaintiff, who is blacksmith and ironmonger.

Plea: The general issue.

On the 8th instant, the Plaintiff declared his option and choice to have and obtain the trial and verdict of a jury, under

(1) V. art. 348. C. P. C.

the Prov. Ord., 25 Geo. III, ch. II, s. 9., which declares: (1) "That all and every person having suits at law, and actions, grounded on debts, promises, contracts and agreements, of a mercantile nature only, between merchant and merchant, and trader and trader, so reputed and understood, according to law, and also of personal wrongs proper to be compensated in damages, may, at the option and choice of either party, have and obtain the trial and verdict of a jury, as well for the assessment of damages, on personal wrongs committed, as the determination of matters of fact, in any such cause," and, in consequence, obtained a rule, calling on the Defendants to show cause, "why a jury should not be forthwith struck, according to the course and practice of the court, for the trial of the issue, etc."

Ross, for the Defendants, in showing cause, contended that this case did not come within the letter of the ordinance, which grants the trial by jury in cases of "a mercantile nature only, between merchant and merchant, trader and trader, so reputed and understood, according to law, and in cases of personal wrongs, etc." The Plaintiff was a blacksmith, or worker up of wrought iron, and, as such, had agreed with the Defendants, for the purchase of a certain quantity of coal: which, though a necessary article to enable him to carry on his trade of blacksmith, was not to be resold by him or become an article of trade or traffic in his possession: the Plaintiff was not, therefore, as to the coal in question, a merchant

(1) La s. 9 du ch. II de l'ordonnance du Gouverneur et du Conseil législatif de la province de Québec, de 1785, 25 Geo. III, est en ces termes:

"Que tous et chaque particuliers, qui auront des procès dans aucune des Cours des plaidoiers communs fondés sur dettes, promesses, engagements et conventions concernant le commerce seulement, entre négociants et négociants et entre marchands et marchands, réputés et connus comme tels, suivant la loi, et aussi concernant les injures personnelles qui doivent être compensées en dommages, pourront, à l'option et choix de l'une des parties, avoir et obtenir qu'ils seront plaidés devant un corps de jurés pour avoir un verdict, tant pour déterminer le fait qui doit être établi dans telles actions de commerce, que pour constater les dommages dans celles d'injures personnelles. Pourvu toujours que l'opinion de neuf des douze jurés qui en composeront le corps, soit suffisante pour faire le rapport d'un verdict, et que le dit verdict, ainsi fait et rapporté, sera tenu comme légal et effectif, à toutes fins et à tous égards, comme si les douze jurés avaient été unanimes en opinion. Et le greffier de la Cour écrira les noms des jurés sur le registre de la Cour dans chaque cause, où les verdicts pourront être rapportés, comme ci-dessus.

"Pourvu aussi que dans tous tels procès ou actions, qui seront entre les sujets de Sa Majesté nés dans la Grande-Bretagne, Irlande, ou colonies et provinces en Amérique, les jurés, en tels cas, seront composés de sujets nés, comme il est dit ci-dessus; et que dans tous procès ou actions entre les Canadiens et nouveaux sujets de Sa Majesté, les jurés seront composés de tels Canadiens et nouveaux sujets; et que dans tous procès et actions entre les anciens sujets et les Canadiens ou nouveaux sujets, les jurés seront composés d'un nombre égal de chacuns, s'il en est ainsi requis par l'une des parties, dans aucuns des cas ci-dessus mentionnés."

or trader, and, unless both parties are such, the ordinance does not give the trial by jury.

BOWEN, in support of the rule: A blacksmith and ironmonger is, and must be considered to be, in every point of view, a dealer and trader. He, most unquestionably, is not in the situation of a mere journeyman, who bestows only his personal labour. A blacksmith, not only furnishes labour, but materials, and, afterwards, abides the risque of the sale of the goods he has, as blacksmith, manufactured. Coal are absolutely necessary to carry on his trade: and, therefore, every contract for coal, for the purposes of his trade, is made in his character of blacksmith, and consequently of trader.

SEWELL, CH. J.: This rule must be made absolute. A jury is allowed by law (1) in any suit or action, between merchant and merchant, or trader and trader, which is grounded on debt, promise, contract or agreement of a mercantile nature. The Defendants, in this action, are merchants, and the Plaintiff is a blacksmith and ironmonger, that is, a dealer in iron goods, which he buys and sells in the way of trade: the parties, therefore, are within the very letter of the ordinance, and as the base of the action is alleged, upon the face of the declaration, to be an agreement, between the Plaintiff and Defendants, for "the sale and delivery of a cargo of coal," which the Defendants refuse to accomplish, the action is plainly grounded on an agreement of a mercantile nature.

PER CURIAM: Rule absolute. (*Pyke*, p. 3.)

EXCEPTION DILATOIRE.—ACTION OF DAMAGES.

COURT OF KING'S BENCH, Quebec, 12 February, 1810.

PRESENT: SEWELL, CH. J.

HARTSHORN and others, against SCOTT and SOMMERVILLE.

Held: That, where a suit is pending in the Admiralty, against certain goods, seized as forfeited; and an action of trespass is brought against the seizors, for the illegal seizure of the same goods; the Defendants may, by an exception dilatoire, claim a stay of proceedings, in the latter, until the former is decided. (2)

This was an action of trespass, against the collector and comptroller of the port of Quebec, for seizing, taking and carrying away, the goods and chattels of the Plaintiffs, upon the pretence, as alleged in the declaration, that the same were

(1) Prov. Ord., 25 Geo. III, ch. II, s. 9.

(2) V. art. 120 C. P. C.

forfeited, under and by virtue of some, or one, of the laws of shipping and navigation.

To this action, the Defendants pleaded an exception dilatoire, in which they set forth, that, in their qualities of collector and comptroller, they had seized, and instituted a suit or action, in the Court of Vice-Admiralty of Lower Canada, against a certain schooner, called the "Beaver," her takel, apparel, and furniture, and the goods, wares and merchandize, therein laden: for breach of the laws of shipping and navigation and of the laws of trade and plantations, by which they had prayed that the same should be adjudged to be forfeited, and condemned; the which said seizure, and suit or action, were the same identical facts, upon which the present action of the Plaintiffs was founded; that the said suit or action was then still pending in the Court of Vice-Admiralty, and not discontinued, adjudged upon, or determined, and the legality, or pretended illegality of the seizure, and detention of the "Beaver" and cargo, in no wise ascertained; and, therefore, concluding, that all proceedings, in the present action, should be staid, until the suit or action, in the Admiralty, should be finally settled, by the decree of that court.

The Plaintiffs filed a general answer to this exception, upon which the parties were now heard.

The ADVOCATE GENERAL and BOWEN, in support of the exception, observed, that the proceedings in this cause, ought to be staid, until the decree of the Court of Vice-Admiralty was pronounced, as, should that decree be in favor of the seizure, there will have been no trespass, and this action must then be necessarily dismissed.

STUART, against the exception, contended that exceptions dilatoires must have some positive law to support them, being always unfavourably received, as tending to retard the decision of a cause; in the present instance, no authority had been, nor could be produced, to authorise the conclusions of the Defendant's exception. He cited I Pigeau, 197.

SEWELL, CH. J.: the Defendants have seized and libelled, in the Admiralty, a vessel and cargo (the latter the property of the Plaintiffs), for an alleged breach of the laws of trade and navigation; and their suit is still pending, and undetermined in that court. The Plaintiffs, however, contend that the seizure was an act of trespass, and have brought this action, for the recovery of the damages which they have thereby sustained.

But, it is not pretended that the Admiralty have not jurisdiction over the question raised by the suit there instituted, upon the legality of the seizure. That court, then, having jurisdiction over this question, and being in possession of it

(1) and this question being the gist of the present action, can we do otherwise than delay the latter, until the former is decided? How great an absurdity would follow, if the Plaintiffs should be permitted to proceed, and recover in this action, and the seizure should afterwards be adjudged to be legal, in the due course of law?

PER CURIAM: Let the proceedings be staid. (*Pyke*, p. 5.)

EVIDENCE.—STATUTE OF FRAUDS.

COURT OF KING'S BENCH, Quebec, 13th February, 1810.

PRESENT: SEWELL, CH. J.

HUNT, against BRUCE and others.

Held: That the 17th section of the statute of frauds (29 C. 2, ch. III), is in force in Canada, in commercial cases, as being part of the rules of evidence laid down by the laws of England, to which, in such cases, recourse must be had, under Ord., 25 Geo. III, ch. II, s. 10, and, therefore, a sale of goods, for more than £10 sterling, is not good, if no part of the goods contracted for has been delivered, no earnest given, nor any memorandum thereof made in writing. (2)

The declaration stated that the Defendants, being merchants, did sell to the Plaintiff, who is a blacksmith and ironmonger, 112 chaldrons of New Castle coal, to be taken per invoice; the same being the cargo of the brig "Anne," Robert Weatherly, master, then in the port of Quebec. That the Defendants did agree to deliver the coal to the Plaintiff on demand, at one of the wharves, in the city of Quebec; and that, in consideration thereof, the Plaintiff had agreed to pay to the Defendants, thirty shillings, currency, for each and every chaldron. That the Plaintiff was always ready, and did offer, to receive the said quantity of coal, and to pay to the Defendants the stipulated price, and, in every respect, to conform to the agreement, and did demand and require of the Defendants, to deliver to him the said 112 chaldrons of coal. Yet the Defendants, had wholly failed to deliver the same when demanded, to the damage of the Plaintiff of five hundred pounds.

Plea: The general issue.

The action being grounded on a promise and agreement of a mercantile nature, and the parties being merchants and traders, the Plaintiff, on a former day, had made his

(1) Pigeau, 208, 201, also 89.

(2) V. art. 1235 C. C.

choice to have and obtain the trial and verdict of a jury, under the Prov. Ord., 25 Geo. III, ch. II, s. 9, and having thereon moved for a *venire*, the same had been granted, returnable this day.

The jury being sworn,—

BOWEN, for the Plaintiff, opened the case, when it appeared that there was no note in writing of the agreement, no part of the coal delivered, nor any earnest given, and he was proceeding to prove, by parol evidence, the contract of bargain, and sale declared on, when

ROSS, for the Defendants, objected to the evidence offered, it being in proof of a commercial matter, and insufficient to support the declaration, under the statute of frauds (29 C. 2, ch. III, s. 17), which established rules of evidence, in certain commercial cases, and must be considered as in force in Lower Canada, by virtue of the Prov. Ord., 25 Geo. III, ch. II, s. 10. That by the 17 section of the statute of frauds, it was enacted, "That, no contract, for the sale of any goods, wares, and merchandizes, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest, to bind the bargain, or, in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

He, therefore, contended, that, as no part of the coal had been delivered, nor any earnest paid, nor any note or memorandum in writing made, the evidence offered of the alleged agreement, could not be received; and he cited *Rondeau* vs. *Wyatt*, 2 H. Black. Rep., 63; *Cooper* vs. *Elston*, 7 Term Rep., 14; *Towers* vs. *Osborne*, 1 Stra., 506; *Clayton* vs. *Andrews*, 4 Burr., 2101.

BOWEN, for the Plaintiff, contended that the statute of frauds was no part of the law of Canada, and, in no instance, had been so considered, and, therefore, all the English decisions, founded upon that statute, were inapplicable to the present case, that the Prov. Ord., 25 Geo. III, ch. II, s. 10, had not introduced into this country, the whole body of the English law, in commercial cases, but simply the English rules of evidence.

SEWELL, CH. J.: This cause, after argument, has been referred to a jury, because the parties Plaintiff and Defendants, respectively, are a trader and merchants, and the action founded on an agreement of a mercantile nature, and, as it is clear, that such a cause, in France, would have been cognizable in the consular jurisdiction, it is, with respect to the proof to be adduced, within the principle laid down by the

decision of this court in *Pozer* vs. *Meiklejohn*: (1) and recourse must be had, for the rules of evidence, to the laws of England.

The question, then, is this, is the statute of frauds in this respect, in force in Canada; and does it apply to the case before us, the contract being executory? As to its being in force, the answer is obvious; it is unquestionably a part of the "rules of evidence laid down by the laws of England," to which, by statute (Ord., 25 Geo. III, ch. II, s. 10). It is enacted, "recourse shall be had, in all the courts of civil jurisdiction, in this province, in proof of all facts concerning commercial matters." As to its being applicable to the case before us, the contract being executory; this question (which certainly has fluctuated in Westminster Hall) has, at length, been put to rest, by the very able decision of the court on common pleas in *Rondeau* vs. *Wyatt* (2) and the confirmatory judgment of the Court of King's Bench, in *Cooper* vs. *Elston*. (3) Evidence, therefore, must be given of some memorandum in writing, signed by the parties, or that some part of the coal purchased was delivered, or that some money was paid by the Plaintiff to the Defendants, on account of the coal; the Plaintiff cannot otherwise recover.

No evidence of either was offered, and the Plaintiff, therefore,

PER CURIAM: Was nonsuited. (*Pyke*, p. 8.)

EVIDENCE IN COMMERCIAL MATTERS.

COURT OF KING'S BENCH, Quebec, 14th April, 1809.

PRESENT: SEWELL, CH. J.

POZER, against MEIKLEJOHN.

Held: That the transactions of tradesmen and artisans, in the way of their trade, are to be considered as commercial matters, and, in all actions brought upon such transactions, recourse must be had to the English rules of evidence, under the Ord., 25 Geo. III, ch. II., s. 10, and, generally, in all cases which, by the law of France, were cognizable by the consular jurisdiction. (4)

It was objected, at the enquête, on the part of the Defendant, that the case was not commercial, and that the evidence,

(1) Post., p. 59.

(2) 2 H. Black, 63... (3)...7 Term. Rep., 14.

(4) V. art. 1206 C. C.

offered by the Plaintiff, was inadmissible, under the law of the country in force at the time of the conquest.

The chief justice Sewell delivered the opinion of the court as follows:

The Plaintiff *Pozer* is a merchant, and alleges, in his declaration, that having purchased 77 hogsheads of beer, he stored them in the cellars of the Defendant Meiklejohn, who is a brewer, and he demands the value of the beer and of the casks, on the ground of Meiklejohn's refusal to deliver them.

Meiklejohn, on his part, admits the receipt of the beer, and of the casks, and, also, his refusal to deliver them, in which he persists, alleging that *Pozer*, after storing them in his cellars, upon his own account, sold the whole to him, and that he is ready to pay the price, at which he purchased. These allegations are denied by Pozer, and the principal inquiry, therefore, will be, whether the beer and casks were or were not so sold to Meiklejohn. But the immediate question, that, which we are now called upon to decide, turns upon the evidence offered by the Plaintiff; and we are to determine, whether, in this cause, recourse shall be had to the common law of Canada, that is, to that law which was in force, in the province, at the conquest; or to the "rules of evidence laid down by the laws of England." A recourse to the common law of Canada, is the ordinary rule, to the law of England, an exception created by statute for those cases, in which, "proof is to be made of facts concerning commercial matters." The 10th section of the Ord., 25 Geo. III, ch. II, having enacted that, "in proof of all facts concerning commercial matters, recourse shall be had, in all courts of civil jurisdiction in this province, to the rules of evidence laid down by the laws of England." (1) If, therefore, the facts in this case be facts concerning commercial matters, we must be governed by the law of England, if not, by the common law of Canada.

In France, before the establishment of the Sovereign Council of Quebec, and, particularly, in the vicomté of Paris, there were particular jurisdictions (*juges consuls*) who were appointed "afin de juger les affaires de commerce." (2) It is true, that in the provinces, or districts of France, in which no juges consuls were appointed, all "affaires de commerce," as well as ordinary matters, were heard and determined by

(1) La section 10 de l'ordonnance du Gouverneur et du Conseil législatif de la province de Québec, de 1785, 25 George III, ch. II, se lit comme suit :

" Dans la preuve de tous faits concernant les affaires de commerce, on aura recours, dans toutes les Cours de jurisdiction civile, en cette province, aux formes admises, quant aux témoignages, par les lois anglaises. "

(2) Juris. Consul., vol. I, p. 1.....

the ordinary courts of law; (1) but it is equally true, that, when they were appointed, they held the exclusive cognizance of all commercial matters in dispute, and of no other. (2) Every matter in dispute therefore, to which, the jurisdiction of the juges consuls extended, was, according to the law of France, a commercial matter, or case, and all the facts, relating to such matters, were, consequently, "facts concerning commercial matters."

Now, the system of jurisprudence which we administer, has for its basis the law of France, and, particularly, that portion of the law of France which was observed as law in the vicomté of Paris, before the establishment of the Sovereign Council of Quebec; and, as the distinction, between commercial and ordinary matters, is thus known in the law of Canada, it is a safe course, for the legal interpretation of that new rule, which, in such general terms, is prescribed by the ordinance, (3) to enquire whether the case be, or be not a matter which would have been cognizable, in the jurisdiction of the juges consuls, as a commercial matter, that being the best criterion, by which we may decide, whether the facts of the case be, or be not, "facts concerning a commercial matter." The 16th title of the Code Civil prescribes "la forme de procéder," that is, the practice in the courts of the juges consuls, and it is undoubtedly a fact, that the whole of this title was abolished by the redaction, "attendu que cette juridiction n'est point établie dans le pays." (4) But this does not affect the conclusion to be taken, the enquiry is, what, according to the law of Canada, was an *affaire de commerce*, or commercial matter? and not, what was the practice, or *forme de procéder*, in a commercial matter? What was a commercial matter, according to that portion of the law of France, which was in force in Canada, was such, by the law of Canada, and, although, every such case was cognizable in the ordinary courts, yet, if a consular jurisdiction had been created, it would have claimed, and it would have held, the exclusive cognizance of such cases, as, in France, under the preexisting laws of the colony; the form of proceeding, only, would have varied from that which is prescribed by the Code Civil.

Upon the principles stated, this will be found to be a very clear case. All tradesmen, by the law of France were considered to be merchants, or rather dealers; and all suits, to which

(1) 2 Pigeau, 130...; (2) L. C. Denizart, *verbo* consuls des marchands, s. 1 and 2, and authorities cited post.

(3) Prov. Ord., 25 Geo. III, ch. II, s. 10.

(4) Edits et Ord., vol. I, p. 140.

merchants and dealers were parties, and in which, the cause of action arose in the way of trade, were held, in the courts of Paris, to be commercial matters, or *affaires de commerce.*

The edict of 1563, which created the consular jurisdiction of Paris, enacts:

" Que les juges et consuls des marchands connaîtront de tous procès et différends qui seront ci-après émis entre marchands, pour faits de marchandises seulement, privativement à tous juges royaux. " (1) And the 4th article of the 12th title of the ordinance of 1673, which, in this respect, was merely declaratory of the law of France, as it then stood, and had long been practised, as shall hereafter be shown, and being declaratory, is now cited on that account, and on that account only, is, in these distinct terms;

" Les juges consuls connaîtront des différends pour ventes faites par des marchands, artisans et gens de métier, afin de revendre, ou travailler de leur profession ; comme tailleurs d'habits pour étoffes, passements et autres fournitures ; boulangers et pâtissiers, pour bled et farine ; maçons pour pierres, moëlon et plâtre ; charpentiers, menuisiers, charrons, tonneliers, et tourneurs, pour bois ; serruriers, maréchaux, taillandiers et armuriers, pour fer ; plombiers et fonteniers, pour plomb, et autres semblables "(2). Le Camus, and the author of the *Jurisprudence consulaire*, are equally explicit. " Sous le nom de marchand (says the former), on doit comprendre les artizans et les revendeurs, pour ce qui concerne leur commerce " (3) And the latter says: " Tous ceux qui achètent pour revendre ou pour travailler de leur métier sont justiciables des consuls." Tous les auteurs s'accordent sur ce point (4).

It has been, just now, observed, that the 4th article of the 12th title of the ordinance of 1673, was merely declaratory of the law of France, as it then stood, and had been long practised, and this will appear, upon reference to the arrêt of the 12th of May, 1657, pronounced " en l'audience de la grande Chambre ", and reported in Ricard's *Recueil d'arrêts*, arrêt 2d ; (5) In this case the Plaintiff was a tanner, and brought his action against two shoemakers to recover the value of a certain quantity of leather, sold to them, in the way of trade : and this was held, and determined, to be a case within the jurisdiction of the juges consuls of Châlons, where

(1) 5 L. C. Denizart, 368, col. 2.

(2) L. C. Denizart, vol. V, p. 369.

(3) 5 L. C. Denizart, 449.

(4) 5 Juris. Cons., 17.

(5) Vide also Bornier, vol. II, p. 762, where the arrêt is stated.

the sale was made, and not to be, within the jurisdiction of the Prévosté of Châlons, which, as the ordinary court of law, had claimed cognizance of the suit, and was party to the arrêt.

But, even admitting that, before the conquest, what, by the law of France, was a commercial matter, or *affaire de commerce*, was not to be so considered in Canada, because, in the peculiar law of Canada, there was no such distinction, still, as such a distinction is now introduced, the wisdom and experience of France, in the designation of her commercial matters, by her edits, déclarations, and arrêts of her courts of law, are the best and safest guides of the true construction of an Ordinance, by which, this distinction has been made, by way of exception to the ordinary rules of evidence, which are derived from the law of France. Whether the ordinance has gone beyond the law of France, or, how far it has gone beyond it, we need not, at present, inquire, as the case does not call for it.

The application of the authorities which have been cited is too clear to require any comment : this is clearly a commercial matter, which would have been cognizable in the jurisdictions of the juges consuls, and in the proof of all facts concerning it, we must, therefore, have recourse to the rules of evidence laid down by the laws of England, by which the evidence offeredis as plainly admissible. (*Pyke*, p. 11, and *Stuart's Rep.*, p. 122.)

Vide Toubeau, *Les Instituts du droit consulaire.*

SHERIFFS' SALE.—LEASE.—OPPOSITION AFIN DE CHARGE.

COURT OF KING'S BENCH, Quebec, 14th February, 1810.

BOGLE, and others, against CHINIC and PROUX and BONENFANT, Opposants.

Held : That the lessee of a property, seized and advertised for sale by the sheriff, cannot, by opposition afin de charge, claim that the property should be sold subject to the unexpired term of his lease. (1)

A writ of *fieri facias* having issued, in the cause, against the moveable and immoveable property of the Defendant : on the 8th instant, the sheriff returned that he had seized and advertised for sale, according to law, the lands and tenements of the defendant, since which, he had received, on the part of François Proux and Vincent Bonenfant, the opposition afin de charge annexed to his return.

It appeared, by the return of the sheriff, the opposition

(1) V. art. 659 C. P. C.

annexed, and the papers filed by the Opposants, that a dwelling house and lot of land belonging to the Defendant, in the lower town of Quebec, had been seized and taken to execution, at the suit of the Plaintiff, the lower part of which house had been, by the Defendant, on the 1st of September, 1809, by a notarial instrument, or acte, leased to the Opposants, Proux and Bonenfant, for the term of four years, from the 1st of May, 1810, at the yearly rent of sixty pounds, under the special covenant, that the lessor should maintain the lessees in the quiet and peaceable possession of the premises leased, notwithstanding any sale thereof that might be made by the Defendant, under the penalty of all costs, damages, &c, under this lease, therefore, Proux and Bonenfant opposed the sale, to be made by the sheriff, of the said house and lot, unless the same were sold, subject to their lease, and the purchaser bound to permit them to hold and enjoy the lower part of the said house, as leased to them, during the remainder of the said term of four years.

BOWEN, for the Plaintiffs, cited *Praticien français* by Lange, vol. I, 330 ; 2 Pothier, 4 to 271, Louage, n° 285.

SEWELL, CH. J. : It is the right, *prima facie* of an adjudicataire by décret, to put out a lessee of the former proprietor, if he finds one in the possession of the property which he has purchased. (1) The Opposants, Proux and Bonenfant, are aware of this, and, being desirous, that this right shall not enure to the adjudicataire in this case, they require us to make the continuation of their lease a condition of the sale, this, however, is opposed by the seizing creditor, and, as it is so, it is plain that the conclusions of the opposition, which go to this point solely, cannot be granted.

PER CURIAM : Let the opposition be dismissed, with costs. (*Pyke*, p. 20.)

ACTIONS POSSESSOIRES ET PETITOIRES.

COURT OF KING'S BENCH, Quebec, February 16th, 1810.

TREPANIER, against DUPUIS.

Held : That the possessory and petitory actions cannot be joined, and the vice is not cured by consent of parties. (2)

The Plaintiff, by his declaration, set forth his title to a certain lot of land, alleging that he had been the proprietor

(1) 1 Pigeau, 753, 774 ; 1 Lange, 330 ; L. C. Denizart, vol. III, p. 37, n° 15 & 16.

(2) V. art. 948 C. P. C.

and possessor thereof, since the 4th of March, 1805, and that the Defendant had, within the year preceding the action, and, at different times before, committed divers trespasses thereon, by cutting down the trees, and erecting a log house and saw-mill, on the said land, and concluding that, by the judgment of the court, it should be adjudged, ordered and declared:—First, that he, the Plaintiff, is the proprietor of the said lot of land; secondly, that the Defendant be forbidden, in future, to disturb the Plaintiff in his possession; thirdly, that the Defendant do remove the said log house and mill; and lastly, that he be condemned to pay damages, by reason of the trespass, etc.

To this action, a plea was filed by the Defendant, taking issue, as well upon the title to the land, as upon the alleged tresspass; and the parties were heard en droit, upon the issues raised by the pleadings.

SEWELL, CH. J.: The declaration in this case has blended the possessory and petitory actions together. The Plaintiff proceeds upon his possession, and takes the usual conclusions of the action en complainte; but, in the same declaration, he sets forth his title, prays judgment upon it, and that he may be declared proprietor of the soil. This is in direct violation of the Code Civil: "Les demandes en complainte, "ou en réintégrande, ne pourront être jointes au pétitoire, "ni le pétitoire poursuivi que la demande en complainte ou en "réintégrande n'ait été terminée, et la condamnation parfour-"nie et exécutée." (1) It is true, Jousse, in his commentary upon this article, has said, that, in his opinion, this prohibition extends to the court only, and that all that is forbidden by it may be done by consent of parties. (2) But this distinction is not admitted, or even noticed by other commentators; nor is there any adjudged case in support of it (3), and certainly, it is dangerous to hold in principle, that a rule, which the law has established upon grounds of public expediency, can be set aside by the act of individuals.

PER CURIAM: All that part of the declaration and pleadings which related, in any manner, to the pétitoire, was declared null, and of no effect. And it was ordered that the parties proceed respectively to the adduction of the proofs of the facts, by them severally alleged, upon the possessoire only. (*Pyke*, p. 24.)

(1) Tit. XVIII, art. 5. (2) 1 Jousse, 387. (3) See 1 Pothier, 4to, 112, and IV, 458; Ravant, 71; 1 Pigeau, 171; Serpillon, 282-283; 1 Bornier, 131.

SHERIFF'S SALE ;—OPPOSITION ;—BIDDER.

COURT OF KING'S BENCH, Quebec, 16th February, 1810.

BAKER, against Young and another, and BLACKWOOD, intervening Party, and divers Opposants.

Held : That when at a sale of property taken in execution, the sale is stopped by the sheriff, the last and highest bidder, at the period, does not become the adjudicataire of, or acquire any right to the property put up, although the sheriff may have acted illegally, in discontinuing the sale. Nor can there be any sale, unless the bidding has been accepted by the knocking down of the hammer, or some act equivalent to it. (1) Nor can a Defendant, by opposition, stop the sale of his property, upon the ground that the sum bid was not near the value of the premises, unless the Plaintiff and the several Opposants afin de conserver consent thereto.

A writ of *venditioni exponas* having issued, commanding the sheriff to sell certain real property of the Defendant, which had been by him previously seized, and taken in execution, under a writ of *fieri facias*, sued out by the Plaintiff, against the Defendants, on a judgment recovered in this cause, he, in the usual manner, advertised the property so seized for sale, and gave notice that the same would be sold and adjudged to the highest bidder, on Monday the 14th of August, 1809. On the 2d of October following, the sheriff returned, " That, in obedience to the said writ of *venditioni exponas*, he had, after complying with the formalities required by law, proceeded, on the said 14th of August last, in the usual manner, to the sale of the said real property to the Defendants, commonly called the distillery at Beauport, but that the same not having produced, as alleged by the Defendants, near its value, three thousand and fifty pounds having been offered, on the part of John Blackwood, as the third, last and highest bidder, the adjudication had not taken place, by reason of an opposition on the part of the said Defendants, consented to by the Plaintiff's attorney." The opposition of the Defendants was, at the same time, returned and filed by the sheriff, in which they allege, for grounds of opposition, as follows :

" Parce que la valeur du dit lot serait considérable, et que l'adjudication faite, faute de la concurrence d'un nombre suffisant d'enchérisseurs, tendrait à la ruine des Opposants, et affecterait essentiellement les intérêts de leurs créanciers, qu'il est de leur intérêt que le dit lot soit adjugé à sa valeur, ou, au moins, aussi approchant de sa valeur que possible, ce qui ne peut résulter que de la concurrence des enché-

(1) V. art. 685 C. P. C.

risseurs, surtout de la Grande-Bretagne où les gazettes, dans lesquelles l'avertissement du shérif aurait été inséré, auraient été envoyées." A variety of oppositions afin de conserver, on the part of different creditors of the Defendants, were likewise returned, and filed by the sheriff, which had been duly signified to him, after the property in question had been by him seized. Upon this return of the sheriff, Bowen moved to file a petition in intervention, on the behalf of Blackwood, which, after hearing the parties, the court permitted him to file: in this petition, after stating the seizure, by the sheriff, of the distillery at Beauport, and the advertising of the same for sale, on a particular day, Blackwood alleged, that, on the day fixed for the said sale, he did lawfully bid and become an enchérisseur of the said distillery and premises, and, after several biddings and enchères, did, then and there, become, and yet remained the last and highest bidder, or *dernier et plus haut enchérisseur* thereof, for the price or sum of £3050, and did, then and there, become entitled to be the adjudicataire of the said distillery and premises, but that the Defendnts, on the said day of sale, contrary to law, filed an opposition in the hands of the sheriff, formally prohibiting and opposing the adjudication of the said distillery, by reason of which opposition, the sheriff did not adjudge to him the said distillery, as he was bound to do, and, therefore, he concluded, first: That the opposition of the Defendants should be declared, in all things null and void, and dismissed with costs; and secondly, that the sheriff should be ordered and directed to make good and sufficient title to him (Blackwood) of the said distillery, etc., upon his paying the said sum of 3050 pounds, etc., etc.

To this petition a general answer was filed by the Defendants and Opposants, Young and Ainslie.

Bowen, in support of the petition, contended that the opposition of the Defendants to the adjudication, upon the grounds of a want of bidders, and of the premises being of greater value than the sum bid by Blackwood, was no opposition in law, and that the sheriff ought not to have received it, at the moment of the sale, as, by the Prov. Stat., 41 Geo. III, ch. VII, s. 11, the same should have been notified to him fifteen days previous to the sale; that, the Defendants had taken upon themselves to fix the value of the premises, and, thereby, prevent the execution and effect of the King's writ, and if such an interference could be allowed, a similar opposition might be made by the Defendants to the execution of any subsequent writ, and, so *ad infinitum*, and the ends of justice defeated; that the day fixed by the sheriff for the sale of property taken in execution was peremptory, and the sale could not be postponed, unless there was an impossibility to proceed, as in the case of

a want of bidders. (*L. C. Denizart*, verbo *enchère*, sec. 4, n° 1 and 4; *Répertoire de Jurisprudence*, verbo *enchère*: 1 *Pothier*, 4to p. 654, Traité du contrat de vente, ch. II, s. 3, n° 516; Pothier, *Coutume d'Orléans*, 788; *Introduction au titre* XXI, *Des criées*, s. 9, n° 64.) But, in this case, no such reason existed, there were bidders and Blackwood being the last and highest, the sheriff ought to have adjudged the premises to him, and having refused or rather neglected so to do, Blackwood had been compelled to apply to this court for relief, and he trusted that, by its judgment, the sheriff would be ordered to perfect the sale, and to execute the necessary title to Blackwood of the distillery, etc., so contracted for, and acquired by the latter.

STUART, on the same side, observed that, in the present case, it was not necessary to advert to the French law, since the Prov. Ord., 25 Geo. III, ch. II, had fixed and determined the law upon the point in question, and had superseded all other,(1) as between individuals, a similar conduct to that of the sheriff in the present instance, would have been considered a breach of faith, how, much more so might it be considered, when it was the act of a public officer, under the direction of a court of justice. In the advertisement of the sheriff, filed and in evidence, he saw sufficient to found the title of Blackwood, it was in these terms: "Now I do hereby give notice, that the same will be sold and adjudged to the highest bidder, at the court house, in the city of Quebec, on Monday, the 14th day of August next, at eleven of the clock, in the forenoon, at which time and place the conditions of sale will be made known".

By this, the sheriff had engaged that the premises should be sold to the highest bidder, on a particular day, a promise and engagement, on the part of the officer of this court, which should have been complied with, unless some legal impediment

(1) La section 33 du chapitre II des ordonnances du Gouverneur et du Conseil legislatif de la province de Québec, de 1785, 25 George III, se lit comme suit;

"Lorsque des immeubles seront saisis par le shérif, en vertu d'exécutions, il en avertira la vente par trois différentes fois dans la *Gazette de Québec*, pour être procédé à la dite vente un jour fixé, après l'expiration de quatre mois, du jour de la date du premier avertissement, et il fera publier la dite vente à la porte de l'église de la paroisse où seront situés les biens, immédiatement après le service divin, pendant trois dimanches consécutifs qui précéderont la vente, et fera afficher une copie du dit avertissement à la porte de l'église paroissiale; et que les terres en roture seront vendues à la porte de l'église de la paroisse où elles auront été saisies. Et il est en outre ordonné que le shérif avertira immédiatement après la saisie, que tous et chaque particuliers qui auront quelques prétentions sur les immeubles, ainsi saisis, par hypothèques, et autres droits, ou servitudes, en donneront connaissance à son bureau, soit avant, ou après la vente, suivant la distinction qu'en fait la loi. Et pour lever tous doutes, il est statué, que les ventes faites par le shérif, sans aucunes autres formalités, auront les mêmes forces et effets que les décrets qui étaient faits ci-devant."

had intervened to prevent it. Upon the return of the sheriff, is was stated, that, after the usual formalities, the premises had been set up, and that Blackwood was the third last and highest bidder, and, consequently, the sheriff was bound to adjudge the premises to him. In France, the interference of the court was necessary to complete the adjudication, but, here, under the existing law, it was not necessary, and, the conditions of the sale being complied with by the purchaser, the adjudication of the sheriff was final. The court, he said, would always look with a jealous eye upon oppositions made by Defendants, and discourage every attempt to stop the effect of the King's writ. It was true that the Plaintiff had consented to the opposition to the adjudication, but there were other parties whose consent was equally essential. Blackwood was entitled to the performance of the sheriff's engagement, and, inasmuch as the sheriff had omitted to do what clearly he ought to have done, the court would consider it as done, and give the proper effect to it, by ordering the sheriff to execute a title in favor of Blackwood.

BORGIA, against the petition, contended that the opposition of the Defendants was what, under the ancient law of the country, was termed a réquisitoire, and was not one of those mentioned in the Prov. Stat., 41 Geo. III, ch. VII, s. 11, the provisions of which did not reach it. That by the the Prov. Ord., 25 Geo. III, ch. II, the sheriff was placed in the same situation as the court stood, under the ancient law, in the adjudication of property, inasmuch as it was therein declared, that the sale by the sheriff should have the same force and effect as the decret by the court. By the ancient law, the bidder was bound by his bidding, but not the person selling, nor the court, nor, as in this case, the sheriff, until the property is adjudged, which is an acceptance of the bidding, and, inasmuch as the sheriff, in the present case, did not adjudge, there had been no acceptance of the bidding on his part, and the petition of Blackwood ought, therefore, to be dismissed, unless a positive authority could be produced to show, that the ancient law of Canada, in this respect, had been abrogated, which he denied, nor was the right of a *remise d'enchère*, which the judge, under the ancient law, granted, *ex officio*, on the requisition of one of the parties, when the sum bid for the property did not approach its real value, in the least changed, and he cited Duplessis, I vol., fol. 16, book V, ch. VI, "De l'adjudication."

The ADVOCATE GENERAL for the Plaintiff said that no odium could attach to the Opposants, as the proceedings adopted by them were calculated for the benefit of their creditors, and of all concerned, by preventing the sacrifice of a valuable property; he asked whether it was not competent to the Plaintiff

to stop the sale, and the effect of the writ of execution, though there were biddings, by declaring that the debt, for the payment of which the property had been seized, was satisfied; he contended that the Plaintiff had such a right, and in the present case the Plaintiff had been so far satisfied, that he had acquiesced in the opposition of the Defendants, and consented to a remise of the sale for beneficial purposes.

BOWEN, in reply, denied the right to claim a remise of a sheriff's sale under the existing law, it having been done away by the Prov. Ord., 25 Geo. III, ch. II, which gave no power to the sheriff to postpone the sale, he, however, admitted, that the case would have been different, and would have afforded some colour for postponing the sale, if, before the property had been set up, the consent to postpone had been given for want of bidders, but, the property having been put up, the bidder Blackwood had acquired a right, which no consent of the Plaintiff and Defendants could take away; but, if such consent could avail, still there were other creditors of the Defendants who were opposants, and who ought to have been considered as saisissants equally with the Plaintiff, and whose consent had not been obtained. As to the allegation of the Defendants that the property in question was worth more than the sum bid, he said, the sum which had been offered by Blackwood, ought to have been considered as the true value of the promisses, no person having offered a higher sum.

SEWELL, CH. J: Upon a *fieri facias* the sheriff in this cause takes in execution, at the suit of the Plaintiff Baker, a valuable distillery, and other immoveable property, belonging to the Defendants, situate at Beauport, in this district, he proceeds to the sale, in the usual manner, upon a *ven. ex.*, and there are three bidders, of which the last is Blackwood, the intervening party, but his bidding being no more than £3050, the Defendants oppose the sale, or, rather, the adjudication (with the Plaintiff's consent), upon the ground that the price offered is very greatly below the fair value of the premises. This opposition the sheriff admits, discontinues the sale, and makes a special return of his proceedings in which he states, "That the adjudication did not take place, by reason of the Defendants' opposition." Upon this return, Blackwood has filed a petition in intervention, by which he prays, that the property may be declared to be his, and that the sheriff may be ordered to execute a title in his favor. The prayer of this petition is the matter in dispute.

On the part of Blackwood, it is contended, that the opposition of the Defendants was and is a nullity, and that, upon the face of the return, it is evident that the sale was perfected, that three biddings were made, and that he, being the

last and highest bidder, is the legal adjudicataire, and so entitled to the property. On the other side, that the opposition was a legal and sufficient cause to break off the sale, that the sale was not perfected, and that Blackwood, consequently, is not the adjudicataire. There are thus two questions before us, 1st whether the opposition was or was not a sufficient cause to stay the proceedings? and, if it was not, then, 2ndly whether Blackwood be or be not the adjudicataire of the property?

All oppositions to a sale by décret must be made before it commences; (1) and, so extensively true is this principle, that where the sale has once begun, even satisfaction of the execution, by the payment of debt and costs, is held not to be a sufficient cause to stay the sale, if there be any oppositions afin de conserver. (2)

Upon this ground, and upon the ground that the want of a sufficient consideration (la vilité du prix) cannot, in any instance, impeach an adjudication, (3) I am clearly of opinion that the opposition, or rather the protest of the Defendants, was not legal a cause to stay the proceedings, and that the sheriff was not bound to notice it, notwithstanding the Plaintiff's consent, the Plaintiff being but one among many creditors who were equally parties to the suit, by oppositions afin de conserver, whose consent to stay the proceedings was at least equally necessary, and was not given.

The inquiry is thus reduced to the single question, whether Blackwood, under all the circumstances, can legally be held to be the adjudicataire? and I think he cannot. The manner in which the sheriff is to make sale of immoveable property, taken in execution, is not at all prescribed by the Ord., 17 Geo. III, ch. II, or 25 Geo. III, ch. II, but by universal construction, it has been held, in all the courts of the province, that these statutes intended a sale by licitation, as was practised before the conquest, *à vente publique*, by bidding, in the course of a common auction: it follows, then, that the last and highest bidder must be the purchaser, for, that is the principle of all such sales, but it follows also, that the highest bidder cannot be ascertained, until the close of the sale; and this, of itself, implies the necessity of some formal intimation of that close.

The sheriff is intrusted to make the sale, and no time is prescribed by law within which it must be terminated; the duration, therefore, of the sale is thus left to his discretion, and it cannot be closed without his assent, the property also,

(1) Ord., 25 Geo. III, ch. II, s. 33.

(2) L. C. Denizart, vol. V, p. 590, n° 4.

(3) *Ib.*, vol. VI, p. 57, art. 6.

which is sold by the sheriff (or rather of which he makes sale), is not transferred by him to purchaser (for it is neither equitably nor legally his), but, by the acts which he is directed and empowered to perform; among which is the act of licitation, which must, as well as the rest, be complete, and, therefore, must be perfected, by the usual method of terminating the period for bidding, by the fall of the hammer, or by some act equivalent to it, by which (to that intent) the assent of him who makes the sale is declared. In point of fact, then, it is impossible to say, who is the last and highest bidder at such a sale, before it is closed, and if it is interrupted and not resumed, the last bidder at the moment of such interruption, cannot legally be said to be the adjudicataire, as it is impossible to say who would have been the last and highest bidder, if the sale had continued. For these reasons, it being clear, that the sale in this case was not closed, I am of opinion that the intervening party Blackwood is not the adjudicataire, and that this petition must therefore be dismissed.

WILLIAMS, J.: I concur entirely in the opinion given by the chief justice. The Provincial Ordinance declares, that the sale by the sheriff shall have the force and effect of the decret, under the French law, but, in this case, there has been no sale; if the sheriff has done wrong, the parties must look to him. It is to be lamented the ordinance does not go the length to authorise the sheriff to postpone the sale, but it is wholly silent on that point.

KERR, J.: The questions submitted to our decision by the petition and answer, lies in a very narrow compass: if there was a sale by the sheriff, the petition must be granted; if not, it must be dismissed. When the petition was first presented, I was of opinion it should not be received, as the return of the writ of *ven. ex.* has not stated that any sale had been made; I then thought we could grant the petitioner no relief, and this proceeding, therefore, ought not to be grafted on the original cause; I am not now induced to alter my opinion. By the sheriff's return, it appears the property never was adjudged at all, it is a solecism in language to say that there was a sale, when the lot never was knocked down and adjudged; the knocking down of the hammer is a ceremony used in all public sales by auction, it is this symbol which publicly declares who is the highest bidder, and that the property is transferred by the seller to the buyer? It had been contended that the sheriff engaged in his public advertisement to sell to the highest bidder, and that the petitioner being such, he was bound to knock down the lot to him, and this is urged as a ground for our decree to convey the pro-

perty to the petitioner, on the payment of the highest price offered: but, because the officer of this court has not, in all things, acted in obedience to the writ of execution, is this a reason for the court to order a sale to take effect, when there was no sale? It is a fallacy to say that the petitioner was the highest bidder, he was so in one sense, and not in another, he was the highest bidder at the moment the sale was suspended, not at the time it was completed, for the solemity never took place, by which the sellers' assent to the sale was made manifest; how does the court know that £3050, was the *summum pretium* that would have been given, if the sale had been kept open? If the opposition hat nod been given to the sheriff, and the sale had gone on, for a minute longer, the property might have produced a much larger sum. It is impossible, on any grounds of law or of justice, to the many persons interested in this suit, that the prayer of this petition can be granted.

Petition in intervention dismissed, with costs. (*Pyke*, p. 26.)

COMPENSATION.—PROCEDURE.—DEMANDE INCIDENTE.

COURT OF KING'S BENCH, Quebec, 16th February, 1810.

GUAY, against HUNTERS.

Held: That damages for the non-performance of a special agreement for the transportation of goods, where a part has been transported, delivered, ard accepted, cannot be pleaded, against an action on a *quantum meruit*, for freight earned, upon such part so delivered and accepted. The party must institute a cross demande, or a separate action, for such damages. (1)

The declaration contained two counts: the first, setting forth, that the Defendants were indebted to the Plaintiff, in the sum of £25, for the freight of 109 barrels of potash, belonging to the Defendants, and brought from St. Roch to Quebec in the Plaintiff's schooner, in the month of May last, and delivered to, and accepted by the Defendants, at Quebec: in consideration of which, the Defendants undertook and promised to pay, etc. The second count, *quantum meruit.*

The defence was, that, by a written agreement, entered into between the parties, the Plaintiff had engaged to go down, with his vessel, to St. Roch, and, there, take on board 164 barrels and 5 puncheons of potash, and bring and deliver the same to the Defendants, at Quebec, for which, he was to be paid, by the Defendants, twenty-five pounds. That the Plain-

(1) V. art. 1065 et 1188 C. C., et 151 C. P. C.

tiff did not take on board his said vessel, or bring up to Quebec, the quantity of barrels stipulated in the said agreement: but had only brought up, and delivered to the Defendants, 109 barrels, whereby the Defendants had suffered damage, to the amount on £17.5, and that the Defendants had already paid £5 to the Plaintiff, on account, so that there was now due to him the sum of £2.10, only, which the Defendants tendered and deposited in court.

At the enquête, it was proved, on the part of the Plaintiff, that he did, in fact, bring up and deliver to the Defendants at Quebec, the quantity of 109 barrels of potash, which were received by the Defendants. On the part of the Defendants, the written agreement, entered into by the parties, the non-performance thereof by the Plaintiff, and the expense the Defendants had incurred, in procuring another vessel to bring up the potash left by the Plaintiff at St. Roch were proved. The Plaintiff admitted that he had received 5 pounds on account.

At the hearing, VANFELSON, for the Plaintiff, said he relied on the second count in the declaration, under which, the Plaintiff was entitled to recover freight, for the quantity of barrels delivered by him to the Defendants. That the damages which the Defendants had set forth in their plea could not be awarded to them, under the issue raised between the parties, inasmuch as damages were not specifically claimed, and the court could not grant *ultra petita*, that, if any damages had been suffered, or could be claimed, by the Defendants, they could only be made the subject matter of an incidental cross demande, which the Defendants had not set up.

STUART, for the Defendants, contended that the Plaintiff ought to have brought his action upon the special agreement, implied promises could only be raised where there are no express promises, but, supposing that a general *indebitatus assumpsit* lay in the present instance, the only principle upon which it could be supported was the general one, *quod nemo debet alterius detrimento locupletari*: the plea, therefore, and he evidence in this cause, met the very gist of the Plaintiff's action, they show that the Plaintiff did not deserve to have of the Defendants the sum demanded by the declaration, but only the sum tendered being £2.10. An incidental demand would have been necessary, if the action had been any other than a general *indebitatus assumpsit*, and it was not now competent to the Plaintiff to object to the subject matter of the plea, as he had answered it, and proof had been, in consequence ordered thereon.

CHIEF JUSTICE delivered the opinion of the court, as follows:

The demand of the Plaintiff is a *quantum meruit* for freight to which the Defendants answer, that Guay, the Plaintiff, made a special agreement, for the voyage, and that he did not perform it. They have not, however, instituted a cross demande, for the damages which they have suffered by the non-performance of this agreement, so that the sole question for our consideration is, whether, in this cause, the non-performance of the special agreement can defeat the Plaintiff's right to recover, to the extent in which the Defendants have benefited by his services, upon an implied agreement which is the foundation of the present action? And, we think it cannot. The action in this instance, is not brought upon the original contract, but upon a quasi-contract, founded on the consideration of the benefit which the Defendants have received, and implied from their acceptance of the cargo, which the Plaintiff brought to Quebec. The case is within the rule, laid down in *Luke* vs. *Lyde*, (1) in which an implied undertaking was raised, according to the principles of marine contracts, on the grounds of beneficial service, and labour performed by the Plaintiff for the Defendant, and by him accepted, for which, no other than the Plaintiff was entitled to recover. This rule has been recognized in the recent cases of *Molloy* vs. *Backer*, (2) and *Liddard* vs. *Lopes* (3) and we know nothing, in the law of Canada, which militates against it; it would certainly be unjust if it were otherwise.

For the damages, occasioned by the Plaintiff's non-performance of the original contract, the Defendants have their remedy: but we cannot stop the present Plaintiff in his course, to recover that which he has thus earned, until the Defendants shall think proper to institute their action for the recovery of their damages. The judgment, therefore, must be entered up *pro rata* for that proportion of the entire freight to be paid for 169 barrels of potash, which the Plaintiff has earned, by the transportation of the 109 barrels received by the Defendants.

Judgment in favour of the Plaintiff, for £11. 11. 3½ with interest, and costs. (*Pyke*, p. 36.)

PROCEDURE.—PLEADINGS.

COURT OF KING'S BENCH, Quebec, 17th February, 1810.

FORBES and another, against ATKINSON.

Held: That the Defendant cannot be allowed to plead specially, that

(1) 2 Burr, 882.
(2) 5 East, 322.
(3) 10 East, 529.

which amounts to no more than the general issue. And the payment and the tender must be pleaded by way of perpetual *exception péremptoire en droit.* (1)

The declaration in this cause set forth, "That, by a written agreement, made and entered into between the parties, on the 30th of June, 1789, the Plaintiffs did sell to the Defendant, and the Defendant did purchase of the Plaintiffs 20,000 feet, more or less, of white pine timber, and 10,000 pipe staves, more or less, etc." That the Plaintiffs had performed their agreement, and had, in fact, delivered 54,904 feet of pine, and 6700 staves, etc., but that the Defendant had not paid, wherefore, they prayed judgment for £3027, with interest, and costs. To this declaration, the Defendant filed a plea, entitled *Défense au fonds en fait*, in which he pleaded :

1st That he was not indebted; that he did not owe, and that he did not undertake, as in the declaration set forth ;

2dly That he had not failed or made default in the performance of the agreement stated in the declaration ;

3dly That no greater quantity of pine timber than the quantity expressed in the agreement had been delivered to him, or, received by him ;

4thly That for the quantity of timber delivered, viz. 20,000 feet of pine timber, and 6700 staves, he had paid in part ;

And 5thly That he had made a tender and *offre réelle*, of the balance, which the Plaintiffs had refused, before the institution of the action.

The caption and conclusion of this plea were in the form prescribed for the defence *au fonds en fait*, by the rules of practice, and no part of it was in the form prescribed for the *exception péremptoire en droit.*

The parties being at issue, an application was made by the Plaintiffs for a commission to examine certain witnesses in Upper Canada, when the court suspended its order thereon, and directed that the cause should be inscribed upon the rôle de droit, for a preliminary hearing en droit, upon the pleadings,

SEWELL, CH. J : The case before us is the first in which a question upon pleading has occurred, since the establishment of our present rules and orders of practice, and this will lead us to a more extended consideration of the subject of pleading in general, that the case, under other circumstances, would call for.

Logical, distinct and consistent pleading is essential to the right administration of justice, and, to facilitate the attain-

(1) V. art. 43 à 148 inclus. C. P. C.

ment of this important object, the several forms of pleadings, contained in the Appendix to the rules and orders, have been prescribed.

The principles upon which these forms are founded, should be thoroughly understood, and I shall avail myself of the opportunity now offered, to explain them generally, before I deliver the opinion of the court, with respect to the particular points upon which we are to decide.

Every contested suit at law consists of the *demande* on one side, and the *défense*, upon the other. *Vide* the words *interdits et articulation des faits* in the *Répertoire*.

The term *demande* implies the representation, and the claim of redress which the Plaintiff in any instance, or suit at law, makes against the Defendant, for, or by reason of the facts which constitute his cause of action, and a demande is therefore said to be " the exercise of a right of action. " (1). The term *défense*, on the other hand, implies all that the Defendant offers, by way of opposition or resistance, against the Plaintiff's *demande* (2).

The matters which constitute the *demande* and the *défense*, in any case, are respectively set forth in the pleadings of the parties, which vary, according to the grounds upon which they are made, and the objects they are designed to attain. Pleading, therefore, is the statement of the facts which constitute the Plaintiff's cause of action, or the Defendants' ground of defence, exhibited in writing, in technical form. It is the mode of alleging that which is afterwards to become in evidence the support of the party by whom it is alleged, (3) or, a simple negatur of that which is alleged by an adversary ; the former, being an affirmative, the latter, a negative pleading. (4)

An affirmative pleading consists of two parts, the libel and the conclusion. In the libel (or narration as it is sometimes called), the facts which constitute the ground of the pleading, that is to say, the premises, from which the conclusions in law are to follow, are alleged and set forth, distinctly, as to time, place, person and circumstance ; (5) without comment or argument of any kind. (6). And to the libel, which should contain all that is necessary to justify the conclusion and no

(1) 1 Pigeau, 33.

(2) 7 Pothier 4to 14 ; Code Civil, V tit., art. 1st and 5th.

(3) 3 T. Rep., 159 ; Doug., 278.

(4) Henneccius *in Pandectas*, part 2, s. 32 ; Brown's *Civil Law*, vol. I, p. 35.

(5) 1 Pigeau, 269, 270; 1 Gauret, 4 ; Code Civil, tit. II, art. 1, and tit. XX, art 1.

(6) 7 Pothier, 4to, 55, art. 4, ch. III ; Code Civil, tit. XX, art. 1.

more, is added the prayer of the pleader, in apt words, for that specific remedy or relief, to which, by law, the facts which he has libelled entitle him, and that is the conclusion (1). A negative pleading, in like manner, consists of two parts, of a direct denegation of that to which it answers, and of the conclusion, which asks that relief, or remedy to which the pleader will be by law entitled, if that, which he denies, be not verified.

In the law of England, it is a general rule in pleading, " That a mere prayer of judgment, without pointing out the appropriate remedy, is sufficient, and that the facts being shown, the court, *ex officio*, is bound to pronounce the proper judgment, " (2) but the reverse of this rule is the principle of the law of Canada. With us, the conclusions are held to be essential to the proceedings (3) and must contain, à peine de nullité, all that the judgment of the court must comprehend. (4). For although the conclusions may, by the court, be allowed or rejected in toto, or modified and allowed in part, and rejected in part, (5) still, what is omitted in the conclusions cannot be supplied by the court, not even if it appears in substance in the body, or libel, of the pleading (6). The declaration is the first pleading in every case. It sets forth the facts which constitute the Plaintiff's *demande*, and is always an affirmative pleading.

Pleas are the pleadings, which set forth the *défense* of the Defendant, and these are sometimes negative, and, sometimes, affirmative. A negative plea denies the matters which constitute the ground or *fonds* of the Plaintiff's demande, and does no more : but an affirmative plea alleges some new matter, which being proved, is of itself sufficient to authorize a judgment for the Defendant, notwithstanding the matters which constitute the ground or *fonds* of the Plaintiff's *demande*, and for the purposes of this distinction, the word *défense* is used in a second and limited sense, a negative plea being called a *défense au fonds*, because it impeaches or denies the ground or fonds of the Plaintiff's demande set forth in his declaration, in opposition to an affirmative plea, which is called an *exception* (from the latin *excipere*, to exclude), because it does not impeach or deny the ground or fonds of the Plaintiff's demande, set forth in his declaration, but alleges, and relies entirely upon

(1) Répertoire, *verbo* conclure, 8vo, vol. XIV, p. 77.

(2) 4 East, 502, 509 ; 5 *Ib.*, 270, 271 ; 1 Chitty, 243, 445.

(3) 14 vol. Répertoire, 8vo, p. 77, *verbo* conclure.

(4) 14 vol. Répertoire, 8vo, p. 78 ; Code Civil, tit. II, art. 1.

(5) 14 vol. Répertoire, p. 78, and 17 vol., p. 479, *verbo* demande ; L. C. Denizart, *verbo* conclusions, vol. V, p. 83, n° 2.

(6) 14 vol. Répertoire, 8vo p. 76, 78 ; 1 Pigeau, 399, 400.

one or more new matters, as cause why the Plaintiff's suit should be delayed or dismissed, (1)and hence the maxim *Reus excipiendo fit actor* (2).

The only remaining pleadings known in the law of Canada, are answers and replications, the pleading which is put in by a Plaintiff, in answer to an affirmative plea filed by a Defendant being an answer ; and the pleading, which is put in by a Plaintiff, in reply to a negative plea, or by a Defendant, in reply to a Plaintiff's answer to an affirmative plea, being a replication (3). Thus much being generally premised, with respect to the pleadings which occur in the course of ordinary suits, the nature of each shall now be more particularly considered.

The déclaration is a specification of the matters that constitute the Plaintiff's cause of action, an accurate and logical statement of his complaint or charge against the Defendant,and of the remedy in law for which he demands judgment. In this pleading, the Plaintiff is required, à peine de nullité, to narrate and libel distinctly, as to time, place, person, and circumstance, the several facts upon which he prosecutes, and which he intends to prove in evidence : (4) all of which he therefore offers "to verify, prove and maintain, when,and as the court shall direct, " averring the whole " to be well founded, in fact and in law ; ", and praying, by his conclusion, that the court, under the authority of its jurisdiction, will " compel the Defendant to appear, " and, " to answer unto him the Plaintiff, of *(i. e. concerning)* the demande contained in his declaration, " and will award to him the appropriate remedy in law, which he specifically sets forth and alleges to be the legal result of the premises (5).

By the King's writ, or process *ad respondendum*, the Defendant is summoned to appear, and to answer to the demande of the Plaintiff, contained in his " declaration " (6), and, if he appears (to prevent a judgment against him, by proceedings *ex parte*), he must answer, or show, " that, by law, he is not bound to answer. "

(1) Henneccius, *Elementa Jur. civ.*, p. 395, tit. XIII, art. 1277 ; Henneccius *in Pandectas*, part 2, s. 42 ; 7 Pothier, 4to, 14 ; De la Jannès, vol. II, p. 406, tit. XXIX, art. 629 ; L. C. Denizart, vol. VIII, p. 166, *verbo* exceptions, sec. 1, n° 1 ; 1 Pigeau, 150 ; Jousse, *Idée de la justice civile*, tit. III, part. 2, sec. 1, art. 5, page 63 ; Erskines' *Institutes*, p. 663.

(2) Répert, 8vo, vol. IV, p. 363 ; Jousse, *Idée de la justice civile*, p. 63.

(3). Prov. Ord., 25 Geo. III, ch. II, s. 13.

(4) Code Civil, tit. II, art. 1 ; 1 Gauret, 4 ; Répertoire, II vol. 8vo, p. 4, *verbo* ajournement.

(5) Rules and Orders, p. 233.

(6) Rules and Orders, p. 191.

This constitutes the first great division in pleas : and as it would be contrary to law, to compel a Defendant to answer to a demande, who is not bound by law to do so, and, consequently, what no court lawfully can do ; " whether he be or be not bound to answer ? " must necessarily be a preliminary inquiry, in all cases, in which the Defendant contends, " That he is not bound to answer. " For which reasons, if he does contend, " That he is not, by law, bound to answer, he is required to file, *in limine litis*, his plea or pleas to this effect, without answering the demande : and, from hence, such pleas are sometimes called " preliminary pleas " (1). But, as the principle allegation of every such plea is, " that, in this cause, the court of our lord the King, now " here, by law, cannot proceed," (2) they are more technically distinguished from pleas which answer the demande, (and are thence called pleas to the action), by the title of " fins de non procéder " (3).

A preliminary plea, or " fin de non procéder " from its nature, cannot, in any case, be a negative plea. A negative plea necessarily takes issue upon the facts stated in the declaration, and the Defendant, by such a plea, instead of showing " that he is not by law bound to answer, " would, in fact, answer the demande. As the Defendant must, therefore, plead affirmatively, the matter on which he relies for the support of his averment (" that he is not by law bound to answer ") all fins de non procéder are exceptions.

For the same reason, that is, because they cannot answer the demande, *fins de non procéder* cannot put in issue the right of action, as it respects either the parties, or the subject of the suit ; they have, in truth, relation to the court only, and are founded upon the principle of some defect of authority in the court to compel an answer (4): the matter, which they allege, tending upon this ground solely, " to defeat the present proceeding, " without inquiry whether the Plaintiff hath, or hath not, a right of action ; (5) and therefore, *fins de non procéder* do not pray, " that the action may be dismissed ; " " but " that the writ and process ad respondendum, and the declaration, and each of them, be declared null and of no effect whatever, " or, " that all proceedings be staid until, etc. " according to the legal import, and effect of the matter pleaded (6)

(1) Rules and Orders, s. 7, art. 7, p. 68.

(2) *Ib.*, p. 234, 235.

(3) Serpillon, p. 54, note 2; Jousse, *Cod. civ.*, vol. I, p. 182; L. C. Denizart, vol. VII, p. 638, *verbo* fins de non procéder ; Répertoire, vol. XXV, 8vo, p. 62.

(4) Serpillon, p. 54, note 2.

(5) *Ib.*, p. 54, note 2.

(6) Rules and Orders, p. 236 ; 1 Pigeau, 162.

Fins de non procéder are divided into three classes relating:

1st To the jurisdiction of the court;

2dly To the form of the proceedings;

3dly To some exemption from the common obligation to answer, to which the Defendant is entitled.

The Defendant therefore may show, that he is not by law bound to answer to the demande of the Plaintiff in his declaration contained, by pleading.

1st That, by reason of some matter which he (the Defendant) alleges and sets forth, "The court, by law, cannot proceed in the cause, nor compel him to answer in any manner, unto the *demande*, nor, in any way, take cognizance of the action of the Plaintiff, if any he hath, etc." (1) For want of jurisdiction; and this is the exception déclinatoire. (2)

2dly That, by reasons of some imperfection, defect or want of form, in the proceedings, *i. e.*, apparent upon the face of the procedings, 7 Pothier, 15, as in the writ or declaration, which he specifically setsforth, and of some law rule or order, which he also setsforth, the court cannot proceed, in the cause, nor compel him to answer, in any manner, unto the demande, because the proceedings are null: and this is the exception à la forme. (3)

3dly That, by reason of some matter, which he alleges and sets out, "the court cannot, at this time, proceed, in the cause, nor compel him to answer, in any manner, unto the *demande*," because the matter so pleaded is such, as entitles the Defendant, at this time by law, to an exemption from the common obligation to answer; and this in the exception dilatoire. (4)

When *fins de non procéder* are allowed, the instance or suit is either suspended, until the court has authority to proceed, and to compel an answer, or the writ and process *ad respondendum*, and the declaration are declared to be null and of no effect; the Defendant, in the latter case, being discharged or dismissed out of court, and the Plaintiff obliged to sue out a new process *ad respondendum;* but when they are overruled as frivolous, the Defendant, within the time limited by the practice of the court, is bound to answer to

(1) Rules and Orders, p. 234.

(2) L. C. Denizart, vol. VIII, p. 638, *verbo* fins de non procéder, sec. 2; 7 Pothier, 17; Jousse, *C. C.*, vol. 1, p. 182; Répertoire, *verbo* fin, vol. XXV, 8vo, p. 62; Serpillon, p. 54, n° 2.

(3) Rules and Orders, p. 236; Jousse, *C. C.*, vol. I, p. 182; L. C. Denizart, *verbo* fins de non procéder, s. 2, vol. VIII, p. 638; Répertoire, *verbo* fin, vol. XXV, 8vo, p. 62; 7 Pothier, 15.

(4) L. C. Denizart, vol. VIII, p. 638, *verbo* fins de non procéder, s. 1 and 2; Répertoire, *verbo* fin, vol. XXV, 8vo, p. 62; 7 Pothier, 16.

the Plaintiff of the demande " contained in his declaration," by *a plea to the action*, of which we will now enquire. (1)

As that is a preliminary plea, or *fin de non procéder*, which questions the authority of the court to compel an answer, and *does not* put in issue the right of action as it respects either of the parties to the suit, or the subject matter of the suit ; so, *e converso*, a plea to the action is that which *does* put in issue the right of action as it respects the parties, or the subject matter of the suit, and *does not* question the authority of the court in any manner.

The right of action is put in issue by a negative plea, denying the case stated in the declaration, in point of fact, or, in point of law ; and all such pleas are *défenses au fonds*, for as they contest the very ground or *fonds* of the Plaintiff's *demande*, by denying the truth of the facts set forth in his declaration, or the validity of the law which he avers to be the result of the facts set forth ; they are distinguished from the aggregate of pleas, which is implied by the word *défense* in its general acceptation, and from all other pleas, by the particular descriptive title of *défenses au fonds*. (2).

The right of action is also put in issue by any affirmative plea, which setsforth and pleads any matter relating either to the parties, or to the subject of the suit, which of itself is sufficient *in law* to authorise a judgment for the Defendant, notwithstanding the facts setforth in the declaration of the Plaintiff ; and all such pleas, for the reasons before given are *exceptions ;* (3), but as exceptions of this kind have a *tendency in law* to bar the Plaintiff's action for ever, or to abate it, until the disability, or other effect of the matter pleaded, shall be removed, they are distinguished from that class of *exceptions*, which under the title of preliminary pleas, or *fins de non procéder*, tend merely to show, that the Defendant is not bound to answer ; by the descriptive title of *exceptions péremptoires en droit ;* the word *péremptoire* (from the latin *perimere*, to destroy) being used to express their legal effect (4) :

It is obvious that a Defendant can have but two sources of defence, his own strength, and the weakness of his adversary : and consequently all pleas to the action must be either *exceptions péremptoires en droit* or *défense au fonds* : the former comprehending all pleas to the action which are foun-

(1) Rules and Orders, sec. 7, art. 8 and 9, p. 68, 69.

(2) 7 Pothier, 14.

(3) Vide ante.

(4) 1 Bornier, 39 ; 1 Pigeau, 151.

ded upon the Defendant's own strength, that is, upon new facts not stated in the declaration upon which (having set them forth), *they tender an issue* to the Plainti ; the latter comprehending all pleas to the action which are founded upon the weakness of the Plaintiff, that is, upon the intrinsic inefficiency of the case, which he setsforth in his declaration, in fact or in law, upon which *they take issue.*

As every *défense au fonds* refers entirely to the matter which is stated in the declaration, and is grounded wholly upon the insufficiency of that matter, in point of fact, or in point of law, to support the Plaintiff's suit, a direct denegation of the fact or of the law, is all that is requisite in such pleas, to put the right of action safely in issue with respect to the Defendant, and to throw the *onus probandi* upon the Plaintiff. But where the *demande* must be answered by new facts, not stated in the declaration, the Defendant, for his own safety, must necessarily set them forth with certainty as to time, place, person, and circumstances: for if he does not, the facts, on which he relies for his defence cannot benefit him, because they cannot be shown to the court in evidence : it being one among the first principles of pleading, that the court must judge *secundum allegata et probata* : and that although facts only should be stated in pleading, yet, all material facts must be set out, to enable the court to declare the law, which arises upon such facts, and authorises a judgment for the Defendant, (notwithstanding the facts setforth in the Plaintiff's declaration) and to apprise the Plaintiff of what is meant to be proved, and thereby enable him to deny what is alleged or to aver new matter in answer to it, and to come prepared with proof, according to the exigencies of the case. (1).

Pleas of *défense au fonds* are divided into two classes: 1st, *défense au fonds en droit* which denies the law averred by the Plaintiff to be the result of the matters stated in the declaration (2); and 2dly, *défense au fonds en fait*, which denies the truth of the matters stated in the declaration (3). In the *défense au fonds en droit*, the Defendant, " for *answer au fonds* to the *demande* of the Plaintiff in his declaration contained, "avers", that the allegations of the Plaintiff and the matters and things in his declaration setforth and contained and each and every of them, is and are wholly and altogether unfounded *in law*, and not sufficient therein for the Plaintiff to have or maintain, against him the Defendant, the conclusions in his declaration taken, or any or either of them, or

(1) Code Civil, tit. XX, art. 1 ; Chitty, 217.

(2) 7 Pothier, 14.

(3) *Ib.*

the action of him the said Plaintiff in his behalf," and, therefore (by his conclusions) " he prays that, by the judgment of the court, the action of the Plaintiff in this behalf may be dismissed. " (1) In the *défense au fonds en fait*, the Defendant, in like manner, " for answer *au fonds* to the *demande* of the Plaintiff in his declaration contained, " avers," that the allegations of the Plaintiff, and the matters and things in the said declaration contained, and each and every of them is and are wholly and altogether unfounded in fact and untrue, etc., and therefore " (by his conclusion) " he prays that, by the judgment of the court, the action of him the said Plaintiff in this behalf be dismissed ". (2).

Pleas of *exceptions péremptoires en droit* are in like manner divided into two classes: 1st, PERPETUAL (3) *exceptions péremptoires en droit*; and 2dly, TEMPORARY *exceptions péremptoires en droit*: and these distinguishing titles are derived from the legal effect of these pleas respectively. Both are equally peremptory because, both equally destroy the action to which they are pleaded but their ulterior effect is not the same. A judgment, in favor of the Defendant, upon a perpetual " exception péremptoire en droit," is a perpetual bar to the action in which it is pronounced, and hence the name of *exception perpétuelle*. But a judgment, in favor of a Defendant, upon a *temporary exception péremptoire en droit*, does no more than abate the Plaintiff's action, until the disability, or other effect of the matter pleaded and allowed, is removed, and therefore it is a bar to the action *for a time only*, and hence the title of *exception temporaire* (4) "a plea *ad instantiam perimendam*."

In the perpetual *exception péremptoire en droit*, the Defendant, "*for answer* unto the *demande* of the Plaintiff in his declaration contained," setsforth and libels the special facts which constitute the ground of his exception, which he offers to prove " when and as the court shall direct," averring that by reason thereof, the Plaintiff *by law* cannot *at any time* " have or maintain *any action* against him the Defendant for

(1) Rules and Orders, p. 244.

(2) *Ib.*, p. 246.

(3) See 1 Pigeau, p. 150: "Ces moyens sont appelés exceptions, du latin *excipere* (exclure), parce qu'ils tendent à exclure le Demandeur de poursuivre sa demande *soit pour un temps, soit pour toujours.*"

(4) The epithets *perpetua* and *temporales* were applied to exceptions in the Roman law. Vide Harris's *Justinian's Institutes*, lib. IV, tit XIII, § 10, p. 341; Pothier's *Pandects*, vol. III, p. 251; Ferrières, *Just. Instit.*, vol. VI, p. 274 to 278, and Brown's *Practice of the Civil Law*, 1st edit., vol. II, p. 32. The same distinction prevails in the law of England between abatement and bar, which are sometimes called temporary bar and perpetual bar; 1 Jousse, C. C., 189; Vide *Le Bret* vs. *Papillon*, 4 East, 505.

or by reason of the matters or things in his declaration setforth and alleged or of any or either of them," and therefore (by his conclusion) he prays "that for the *causes aforesaid*, by the judgment of the court, the action of the Plaintiff in this behalf may be dismissed." (1) In the *temporary exception péremptoire en droit*, the Defendant in like manner, "*for answer* unto the *demande* of the Plaintiff in his declaration contained" setsforth and libels the special facts, which constitute the ground of the exception, which he offers "to prove when and as the court shall direct," averring that, by reason thereof, "the Plaintiff *by law* cannot, *at this time*, have or maintain his action against him the Defendant, for or by reason of the matters and things in his declaration setforth and alleged or of any or either of them," and, therefore, by his conclusions he prays, "that, *for the causes aforesaid*, by the judgment of the court, the action of the Plaintiff in this behalf be, *for the present* (2) dismissed.

Exceptions péremptoires en droit do not impeach or deny the case stated in the declaration, and therefore cannot in any instance involve or call for any consideration of the intrinsic merits of that case. As the *exceptio* of the Roman law and the plea in chancery, "they insist that the matter of the *demande* is not to be put in issue." (Gilbert's *Forum romanum*, p. 64.) They invariably set forth some new matter which shows that notwithstanding the matter setforth in the declaration that the Plaintiff's action must by law be dismissed for the present or for ever. (3) But as the new matter which they set forth is sometimes foreign to the matter set forth in the declaration and sometimes connected with it sometimes have reference to the merits of the Plaintiff's demand, sometimes have none, they are distinguished by reference to that which they allege and on which they are respectively founded into *fins de non recevoir* and *fins de non valoir*, (4) those exceptions are *fins de non recevoir*, in which the matter setforth is sufficient in law (*whether the case stated in the declaration be true or false*) to authorise a judgment in the Defendant's favor, dismissing the Plaintiff's action for thepresent, or for

(1) Rules and Orders, 243, 244.

(2) Rules and Orders, 241, 242; 2 Pothier, 4to, p. 729; 1 Pigeau, 199; Répertoire, 8vo, vol. XVII, p. 479, *verbo* demande.

(3) The office of a plea in bar at law or in equity is to confess the right to sue avoiding that by matter *dehors*, giving the Plaintiff an acknowledgement of his right independent of the matter alleged by the plea, that is, the plea admits the bill, but interposes matter, which, if true, destroys it. Per lord Chancellor, 6 Vesey junr, 597.

(4) 1 Bornier, 39, note 1.

ever, as where the Defendant pleads, that the Plaintiff *is an alien enemy*, which is a *temporary exception péremptoire en droit*, or pleads the long *prescription* of thirty years, which is a *perpetual exception péremptoire en droit:* (1) and such exceptions are denominated *fins de non recevoir*, because the matter which they plead shows that the Plaintiff cannot legally *be received*, or admitted by the Court to prosecute the suit which he has instituted. (2) Those exceptions, on the other hand, are *fins de non valoir* in which the matter setforth necessarily admits and confesses the case stated in the declaration, but avoids or discharges it, for the present or for ever, and is therefore sufficient in law to authorise a judgment in the Defendant's favor dismissing the Plaintiff's action: as where the Defendant pleads *term for payment unexpired*, which is an *exception péremptoire en droit temporaire*, or pleads *accord and satisfaction* or *chose jugée (res judicata)* which are *exceptions péremptoires en droit perpétuelles*, and such exceptions are denominated *fins de non valoir*, because the matter which they plead, shows that although the Plaintiff may have a legal cause of action hereafter, or heretofore had a legal cause of action, yet, that he cannot now avail himself of it (3).

Fins de non recevoir and *fins de non valoir*, are thus sometimes, in their effect, perpetual, sometimes temporary: but the classes of *exceptions péremptoires en droit perpétuelles*, and exceptions péremptoires en droit temporaires, comprehend the entire list of *fins de non recevoir* and *fins de non valoir*, and the two latter are therefore subdivisions only of the two former. (4)

To pleas of *défenses au fonds en droit*, or *en fait* because they are negative pleas and take issue, nothing can be offered on the part of the Plaintiff but a general replication (5) by which the issue being completed, the pleadings are concluded. But to pleas of exception, because they are affirmative pleadings, and tender an issue, the Plaintiff must put

(1) 1 Pothier, 346.....

(2) 1 Pigeau, 165, ; 8 L. C. Denizart, p. 638.

(3) Rodier, 75; 1 Bornier, 39. It is a rule in English pleading, that a party justifying must admit the fact, 3rd T. R., p. 298, Taylor *vs.* Cole. Every plea in justification, says Sergeant Williams *in Saunders*, states circumstances which either excuse the fact complained of or shew it to be lawful. From its nature therefore, it must confess the fact, otherwise, it is no justification, but a denial of the fact, and amounts to the general issue. Williams' Saunders, vol. I, p. 28, note 1 and 14; note 3, cites *Taylor* vs. *Cole*, 3 T. R., 298; *Gibbons* vs. *Pepper*, 1 L. Raym., 38; 3 Will, 411, 412.

(4) Rodier, 75, 76.

(5) Rules and Orders, 231.

in an answer which is either general or special. A general answer takes issue upon the matter of the exception, by a general denegation, (1) and such general answer completes the issue, and consequently concludes the pleadings: (2) but a special answer tenders a new issue by setting forth fresh matter in answer to the matter of the exception, which is sufficient to destroy it, and in such case, the issue is not completed, by a general replication, on the part of the Defendant, to such special answer, (3) although the Legislature has forbid the use of all further pleadings. (4)

The principles which I have stated decide the present case. The declaration demands of the Defendant a large sum of money, for the sale and delivery of timber, under a special contract in writing.

To this the Defendant has filed a plea whice he has intituled a *défense au fonds en fait*, in which he pleads specially:

1st That he is not indebted, does not owe, and did not undertake, as in the declaration is alleged;

2dly That he has not failed, or made default, in the performance of the agreement declared on;

3rdly That no greater quantity of pine timber, than that expressed in the agreement, has been delivered to or received by him;

4thly That he has paid in part for the 20,000 feet of pine and 6,700 staves delivered, and that he made a tender of the balance due which the Plaintiff had refused before the institution of the action.

Of these answers to the declaration, three, viz: the 1st, 2d and 3d amount to the *défense au fonds en fait*, and to no more. They are merely negative. They deny the allegations of the declarations, and disaffirm the very matter which the Plaintiff, on the general issue, would be bound to prove, in the first instance, in support of his action; and as this is all that they do, they ought to have been pleaded generally, in the form prescribed by the rules and orders for the *défense au fonds en fait*. A Defendant cannot be permitted to plead specially that which amounts to no more than a total denial of the charge.

Of the remaining answers, one alleges payment, and the other a tender or *offres*. Now a plea of payment is a *perpetual exception péremptoire en droit*: (5) it is so, because it does

(1) Rules and Orders, 220,222,224.

(2) Rules and Orders, sec. 7, art. 21, p. 76.

(3) *Ib.*, 229.

(4) Ord., 25 Geo. III, ch. II, s. 13.

(5) 1 Pigeau, 203; 1 Bornier, 39; 2 Argou, 473; 2 Domat, 230.

not impeach, or deny the ground or *fonds* of the Plaintiff's *demande*, but, on the contrary, admits a cause of action and discharges it by new matter, which is not stated in the declaration, and which consequently it sets out, that new matter being a legal *fin de non valoir*. To plead payment of a debt and at the same time to deny its existence is inconsistent: payment, therefore, ought not to have been pleaded, by way of *défense au fonds*, but by way of *exception* in the form of the *perpetual exception péremptoire en droit* prescribed by the rules and orders. And the tender, or offres, for the balance, which is alleged ought to have been pleaded in the same manner, because an *offre valable*, or tender validly made, is in law equivalent to payment. (1) The plea therefore is entirely defective.

The Defendant by pleading payment, and tender, by way of *défense au fonds*, deprived the Plaintiffs, of the benefit of putting in "an answer" to the new matter of his plea to which they were entitled, and drove them to the necessity (if they noticed the plea at all) of filing a *general replication*, that being the only pleading to *défense au fonds en fait* permitted by the rules. (2) On the other hand the Plaintiffs, instead of taking advantage of the Defendant's misconduct, as they might have done, have filed a replication to his plea, and they are thus as much in fault as the Defendant: both parties have equally contributed to the irregularity of the pleadings, and a repleader, from the declaration must therefore be ordered, that being the point of pleading at which their mutual error commenced.

PER CURIAM: A repleader ordered.—(*Pyke*, p. 40; Stuart's R., p. 106 et 4 R. L., p. 216 et 226b.)

MORTGAGE.—NOTARIAL ACT.

COURT OF KINGS BENCH, Quebec, 20th February, 1810.

BELAIR, against GAUDREAU & WIFE.

A notarial act executed en brevet does not create a mortgage. (3)

This was an action hypothécaire, in which the Plaintiff, by his declaration, setforth, that one Dominique Girard, by his obligation, executed en brevet, on the 1st September, 1804, before Faribault, notary, and two witnesses, did acknowledge

(1) 1 Pothier, *Obligations*, n° 573.

(2) Rules and Orders, 231.

(3) V. art. 3661 et 3677 S. R. Q.

to owe to the Plaintiff the sum of £9. 18. 2, which he did, thereby, promise to pay to the Plaintiff, with interest, and, for securing the payment, did mortgage, generally, all his, property, which he then possessed or might afterwards acquire. that, on the 1st of April, 1808, he, the Plaintiff, obtained judment, in this court, against Girard, for the said sum, together with interest and costs, amounting to £20. 19. 5, upon which judgment, execution was sued out against the moveable and immoveable property of the Defendant, which was afterwards returned by the sheriff nulla bona; that, at the time of executing the aforesaid obligation, Girard was owner and proprietor of a certain lot of land, in the bay of St. Paul, and which, afterwards, on the 16th of September, 1806 (long previous to the judgment obtained against Girard), he sold and conveyed to the present Defendants, and that, therefore, inasmuch as Girard was the proprietor of the said lot, at the time of the making and executing of the aforesaid obligation in favor of the Plaintiff, he the Plaintiff, by the acquisition of the said lot by the Defendants, became their mortgage creditor, for the amount of the said judgment, interest, and costs.

To this action the Defendants filed several pleas, one of which was a défense au fonds en droit, upon which the parties being at issue were heard.

VANFELSON, for the Defendants, contended that, upon the face of the Plaintiff's declaration, the present action could not be maintained, as the Plaintiff did not, in law, acquire any mortgage or hypotheque upon the land in question, under and by virtue of the obligation executed *en brevet*, on the first of September, 1804, mentioned and setforth in the Plaintiff's declaration, and therein stated to have been so executed. That no obligation en brevet could create a mortgage, and that it was only those actes, executed before two notaries, or a notary and two witnesses, of which the minute or original remains with the notary, which could give a right of mortgage.

BERTHELOT, for the Plaintiff, contended that, by the obligation declared on, though executed en brevet, the Plaintiff did acquire a mortgage or hypotheque upon the lot of land purchased by the Defendants from Girard, the same having been executed before a notary and two witnesses.

SEWELL, Ch. J: This is an action hypothécaire founded upon an obligation passed en brevet, before a notary and two witnesses. Mortgages and all their consequence depend entirely upon the authenticity of their dates, and from hence arises the unquestionable principle "that no acte sous signature privée can create a mortgage, and, by parity of reason, no acte ought to create a mortgage, which in respect to the certainty of its date, is not more than equivalent to an acte sous signature

privée." Now, in all cases, in which the original acte remains in the custody and keeping of the notary, the date of that acte can be accurately ascertained by the notary, from the minute which he has kept, but, if no minute is kept, and the acte is delivered en brevet to the parties requiring it, the notary has no better means for establishing the date of the acte than any common witness. And, thus, as to the certainty of its date, the acte en brevet becomes no more than equivalent to an acte sous signature privée. *Le Proust le Royer* (1) states distinctly that an acte en brevet does not create a mortgage. "Un autre privilège (says he) qu'ont les actes reçus par des notaires, c'est qu'ils portent hypothèque, mais il faut pour cela plusieurs conditions. Il faut que ces notaires aient qualité pour instrumenter: il faut qu'ils signent leurs actes; et il faut que les actes ne soient point en brevet, mais qu'il en reste minute." On the contrary, *Le Camus*, in his new edition of Denizart, has the following observation: "Il n'y a point de doute que l'acte passé en brevet emporte hypothèque, aussi bien que celui dont il reste minute, c'est ce qui est attesté par un acte de notoriété du Chatelet, du 24 avril 1703, (2) but, then, it must be remembered that all actes passed before notaries in France were, under the Edict of March, 1693, controled and enregistered in a public office, in the Bureau de Controle (3) that, when an acte was executed en brevet, it was controled and enregistered before it was delivered to the parties, (4) so that the date of such an acte was the day on which it was controled, and no mortgage in point of fact was created, until the acte was enregistered. Let it be remembered, also, that Mr. Pothier is of opinion, that actes sous signature privée acknowledged before notaries by the parties, will create a mortgage, "lorsqu'ils sont déposés chez un notaire," and not otherwise: (5) and that *Le Camus* himself admits that the originals of all actes, in which third persons are interested, which is particularly the case in morgages, ought to be kept in some public office: "Le bien de la société (says he) exige que les originaux de tous les actes qui intéressent, ou qui doivent naturellement intéresser des tiers, soient conservés en quelque dépôt public et inviolable, afin qu'on ne puisse pas les soustraire, les altérer, ou même seulement les tenir secrets au préjudice d'autrui." (6) It is evident, therefore, that in France an

(1) Dic. des Arrêts, vol. II, 649....

(2) 3 L. C. Denizart, 772....

(3) Répertoire, vol. XL, p. 106; Edict of March, 1693; 2 Neron, 245.

(4) 5 Pothier, 422; L. C. Denizart, *verbo* contrôle, sec. 3, n° 6, vol. V, p. 514.

(5) 5 Pothier, 422,....

(6) L. C. Denizart, vol. I, p. 184.

acte en brevet was more than equivalent to an acte sous signature privée, the date being authenticated by enregistration in a public office: and, as upon the whole, we cannot consider an acte en brevet to be in Canada any more than equivalent in this respect to an acte sous signature privée, for the want of that enregistration in a public office, for which the law provided in France, we are of opinion that an acte en brevet does not in Canada create a mortgage.

PER CURIAM: Action dismissed, with costs. (*Pyke*, p. 57.)

DAMAGES.—PENALTY.

COURT OF KING'S BENCH, Quebec, 20 February, 1810.

MURE & JOLLIFFE, incidental Plaintiffs, against WILEYS & HUNGERFORD, incidental Defendants.

Held: That, in an action of damages, for the non-performance of a special agreement, in which a penalty is stipulated to be paid by the party failing, the penalty is not to be considered as stipulated damages, and, therefore, whatever loss, is proved to have been sustained, whether beyond, below or equal to the value of the penalty, the Plaintiff will have judgment for. (1)

To a demande in chief, instituted by Wileys & Hungerford, for the sum of £155.7, alleged to be a balance due upon the sale, and delivery of a large quantity of pine timber, oak timber, and staves, under a special agreement in writing, the Defendants, Mure & Jolliffe, filed a *défense au fonds en fait*, and an incidental cross *demande*, in the last of which they, on their part, alleged, that, by the agreement declared upon, in the *demande* in chief, Wileys & Hungerford had covenanted and agreed to deliver, at Quebec, to them (Mure & Jolliffe), certain quantities of pine timber, oak timber and staves, on or before the 15th of June, 1809, under the penal sum of £200; that the said Wileys & Hungerford had not performed this agreement, and that an action had, thereby, accrued to them, to have and recover from Wileys & Hungerford, the entire damage occasioned by their breach of contract, being £311, for which they concluded. To this incidental cross *demande*, no answer whatever was filed by Wileys & Hungerford: and Mure & Jolliffe, having obtained leave to proceed *ex parte*, the agreement for the timber and staves (dated the 4th of February, 1809, and, in substance, as stated in the incidental demande) was produced and proved at the enquête. It was further proved that no part of the pine, oak, or staves, had been delivered, on or before the 15th of June, 1809, that,

(1) V. art. 1076 et 1135 C. C.

after the 15th of June, and before 1st of August following, the stipulated quantity of pine had been delivered, with 800 feet of oak, instead of the 10,000 feet which the incidental Defendants, by their agreement, had engaged to deliver, but that of the quantity of staves (which was 2,000), not one had been delivered. It was, also, proved that the price of oak timber and staves had very much augmented, between the date of the agreement, and the period fixed for the delivery.

SEWELL, CH. J: The sum to be paid by the party who should fail in the performance of the agreement of the 4th of February, 1809, setforth in the declaration as well of the *demande* in chief, as of the incidental *demande*, is distinctly stated, upon the face of that agreement, to be a penalty, the words being "under the penal sum of £200." And this, effectually, prevents us from considering that sum as liquidated damages. (1) The incidental Plaintiffs are entitled, therefore, by the law of Canada, to do as they have done, that is, to ask for general damages, exceeding the amount of the penalty, (2) as in England. (3) But, to entitle them to recover, they must prove the loss sustained by them, to be beyond the value of the penalty, which they have not done. There is, however, sufficient evidence of loss sustained to the amount of £200, for which judgment must be entered up, with costs.

Judgment in favor of the incidental Plaintiffs for £200, and costs. (*Pyke*, p. 61.)

SHIP.—SALE.—AUCTIONEER.

COURT OF KING'S BENCH, Quebec, 29th February, 1810.

BURNS, against HART.

Held: That, where an Auctioner puts up a registered vessel for sale, without naming his principal, and the same is adjudged, without any express condition, as to the time and manner of executing the written transfer of such vessel, the auctioneer cannot recover, from the purchaser, the sum at which the vessel was adjudged, unless he procure, and deliver to the purchaser a legal transfer of the vessel, executed by the owner, or by some person legally authorised for that purpose, according to the requirements of the register act.

This was an action of *indebitatus assumpsit*, brought by the Plaintiff, an auctioneer and broker, against the Defendant,

(1) 1 Domat, 271, lib. III, tit. V, s. 2, n° 15; 6 L. C. Denizart, 704, Smith *vs.* Dickenson, 3 Bos. & Pul, 630.

(2) Pothier, *Obligations*, n° 342; 4 L. C. Denizart, 566, *verbo* clause, s. 2, n° 2.

(3) *Lowe* vs. *Peers*, 4 Burr., 2228.

a merchant, to recover the sum of £468.10.0 for the hull, and lower standing rigging, masts and yards, of a brig called the "Star," and for sundry lots of sails, rigging, blocks, anchor and cables, being the price at which the same had been sold and adjudged, by the Plaintiff to the Defendant, at public auction.

The case being of a mercantile nature, the Plaintiff made his option of the trial and verdict of a jury, and at the trial, in the last term, the following special verdict was found by a jury of merchants:

" The jury find for the Plaintiff, in the sum of two hundred and forty-eight pounds ten shillings, the amount of sundry lots, sails, riggings, blocks, an anchor and cable, bought of him by the Defendant, on the 17th of June last. The jury also find, that, on the same day, the Plaintiff adjudged to the Defendant, as the last and highest bidder, the hull, masts, and yards, of the brigantine "Star," for the sum of two hundreda nd fifteen pounds, on the condition, that the said vessel was to be, from the moment of being adjudged, at the sole risk of the purchaser; and that the Plaintiff did not, at the time, name his principal. The jury further find, that the Defendant took possession of the vessel, and subsequently promised to pay the whole amount of his purchase, and repaired and offered her for sale; and, also, that the Plaintiff offered to execute, in favor of the Defendant, a bill of sale of the vessel, in his own name, and that of *John Dapwell Hamilton*, acting for the owner of said vessel, of the tenor of that filed by the Plaintiff in this cause, being exhibit n° 2; that one of the conditions of the sale of the said vessel, was that the register should be delivered upon the Monday next following the sale, at the counting house of the Plaintiff, upon payment of the purchase money by the Defendant, and that the Defendant did not call for the same, and that the Plaintiff hath, at all times, been ready to deliver to the Defendant the said register, and that the same was ready to be delivered, on the Monday following, by the Plaintiff to the Defendant, at the counting house of the Plaintiff, and that the Defendant did not call for the same. And the jury submit to the judgment of the court the point of law, regarding the transfer of the hull of the said vessel. And that, if upon the whole matter now found, the court shall be of opinion that the Plaintiff has cause of action for the said last mentioned sum of two hundred and fifteen pounds, then the jury find for the Plaintiff, in the said further sum of £215, if otherwise, then for the Defendant, in so far as respect the said sum of two hundred and fifteen pounds."

The exhibit n° 2, alluded to in the foregoing verdict and produced and proved at the trial, purported to be a bill of

sale from the Plaintiff, William Burns and John Dapwell Hamilton, acting for and in the name of the owner of the brigantine or vessel called the "Star", to the Defendant, in which it was setforth, that the "Star" had been bought by, and adjudged to, the Defendant, at public auction, for the sum of £215, and, in consequence, that they, the said Burns and Hamilton, for and in consideration of the said sum, did, as much as in them was, and they lawfully might, grant, bargain and sell, etc. to the Defendant, his heirs and assigns, the said brigantine "Star," etc. The said bill of sale also contained a copy of the certificate of registry, whereby it appeared, that Alexander Gordon, of Bridge Town, in the Island of Barbadoes, was the sole owner of the said brigantine.

STUART, for the Plaintiff, observed that there were two points of difficulty, the first, arising out of the provisions of the register act; the second, how far the vendor is bound to transfer the property, after a positive sale. These two points were closely connected. He contended that, in the present case, the Defendant could not say he was not the proprietor of the vessel, inasmuch as he had exercised the right of ownership, and would, in that case, be a trespasser. The jury had found, that the Defendant had taken possession of the vessel, and, for aught that appeared to the court, he might be then navigating her; and what recourse remained to the Plaintiff? this proved the principle of the law laid down in Pothier (1), that, after delivery, it was not competent to the purchaser to contest the right to sell, unless he be disturbed. The register act fixed the manner of conveying property in vessels, and has prescribed the form of the transfer, but did not annul the transaction of sale, as between the seller and purchaser.

In courts of equity, the provisions of the register act were less rigidly enforced than in courts of law, and this court, exercising an equitable jurisdiction, would enforce a sale, where honesty required it should be enforced. In a case, in Vesey junr., it had been decided that a transfer was null, because there was no endorsement, and the party was liberated, as otherwise it would be encouraging fraud. But, if there could be a doubt on the arguments already submitted, the subsequent promise of the Defendant, to pay the purchase money puts it out of doubt: (2) and seq; that there was a consideration for the promise was evident, as the Defendant had the use and possession of the vessel; a subsequent promise

(1) Pothier, *Contrat de vente*, art. préliminaire, etc., n° 48.

(2) Pothier, *Traité des Obligations*, n° *457*.

of a widow, in support of a promise made by her in the life time of her husband had been held good. (1)

BOWEN, on the same side, contended that taking the register act in its strictest sense, the present case did not come within the statute, as it was the sale of a hull, and not of a vessel that was seaworthy and to be navigated. The plea to the action was non assumpsit, and the only question, upon the issue raised, was, whether the Defendant undertook and promised, as stated in the declaration? there was a great distinction between the sale of a ship, and that of a hull of a ship, and the verdict only found that a hull had been sold. In this case, a bill of sale had been tendered by the Plaintiff to the Defendant, and it must be considered to have been a legal bill of sale. It was in vain that the Defendant now contended that the person, acting for the owner, was not legally authorised, this could not be presumed. The hull was sold as a common chattel, and not as a ship, and the Plaintiff could, therefore, give the title, *Williams* vs. *Millington*, 1 H.B. Rep., 81. That the Defendant had taken possession of the hull, and had repaired and offered it for sale, under a title acquired from the Plaintiff, and he could not then be at liberty to content that title. In this case, the Defendant had chosen to go to an expense, which the owner or his agents had not, by rendering the vessel once more seaworthy, this he was at liberty to do; and, therefore, the register had been given to him: but the hull, only, had been sold. He concluded by saying, that the completion of the contract, on the part of the Plaintiff, had been fully established by the verdict.

The AVOCATE GENERAL for the Defendant, observed that there was no resemblance between the facts found by the verdict, and the allegations of the declaration, the former, he said, went beyond the latter, and that, being the case, the verdict was bad, as the jury could not find beyond the issue, or any facts that were not pertinent thereto. (2. Bacon's Ad. letter D. *Special verdict.*) The verdict and declaration varied, as by the former, nothing was said of any warranty, on the part of the seller, as stated in the declaration; nor in the declaration was it stated, that at the time of the sale, the Plaintiff did not name his principal, and yet it was so found by the verdict. It was the same, with regard to the subsequent promise of the Defendant to pay, of which no allegation could be found in the declaration. He contended that when an article was sold, of which the transfer is specially regulated by law, it must be presumed, that the title which the law required, would be given unless there was an express stipulation, or

(1) Pothier, 237, *Traité des Obligations, n° 464.*

condition to the contrary, at the time of the sale: the answer of the Defendant in the present cause, had always been "show me your authority to sell, and give me a legal title, and I will pay the money." The case, cited from H. Black, was the sale of a simple chattel, he admitted the principle there laid down, but denied that it was applicable to sales of ships, for the transfer of which, the law had specially provided. The parties were not now contending in a court of equity, but in a court of law, and there would certainly be no justice in condemning the Defendant to pay the purchase money, and compel him alterwards to seek his title, he added, that in the bill of sale tendered by the Plaintiff, the agent of the proprietor of the vessel was named, but no such disclosure was made at the sale, nor did the Plaintiff then name his principal, and he cited *Hanson* vs. *Roberdeau*, Peakes N. P., 120. He, therefore, contended that under the whole circumstances of the case, the Plaintiff not being authorised, nor able to give a bill of sale of the vessel, according to the requirements of the register act, he could not recover, from the Defendant, the sum demanded, as the price of the vessel.

STUART, in reply, said, that the Defendant admitted the adjudication, but denied that there had been a legal sale: the verdict however had found the facts necessary for the support of the Plaintiff's action, and that finding was conclusive. The principal, contended for by the Plaintiff, had been decided in England upon a sale of real property, Gilbert's action of debt, 363, where B was compelled to pay the purchase money, and left to his action of covenant against A to give and complete the title. When a person acted in the name of another, the presumption must be that he had an authority to do so, and he was bound to produce and maintain that authority: in the case, mentioned in Pothier, of the sale of real property, for which the vendor could not show a title was applicable; He contended that the Defendant, having taken possession of the vessel, after the adjudication, and subsequently promised to pay the purchase money, closed the transaction as to the Defendant; for, when, in the case of a debt contracted by a femme covert, she is benefited, an action will lie against her for the amount, after the death of her husband. In the present instance, the time, which would have been required to procure a title from the owner, who resided at a distant port, would have led to a total loss of the vessel, and, consequently, an immediate sale was necessary, therefore, a reasonable time must be given to the Plaintiff to procure the title, or an authority from the owner to execute it.

SEWELL, CH. J: The circumstances of this case are such, that it will not decide any of the questions which have been raised

at the bar, upon the register acts. It stands upon other grounds.

In the purchase and sale of ships, the person, who takes upon himself to sell, must have power to sell, and to transfer the owner's right of property, for, although a sale of goods, or other moveable property, by the person who is in possession, does, in many instances, vest the property in the buyer, even when the seller has neither property in what is sold, nor authority to sell; this cannot take place, with respect to a ship, when sold as a ship, (1) though it may, with respect to the materials of which a ship is formed, when it is broken up, or is become a mere wreck. (2)

Now, it is certain that the "Star" was both sold and bought, not as a mere wreck, but as a ship, and that she was capable of repair. This is certain, because she specifically subsisted as a ship at the time of the sale; because one of the conditions of the sale was, that the register should be delivered to the purchaser, which could only be for the purposes of navigation; and because she has since been repaired. It is material also to observe, that, at the time of the sale, nothing was said as to the transfer of the property, and that, in this respect, the case must, therefore, rest upon the common principles of ship sales.

Upon these grounds, we hold a valid conveyance of the "Star," to the Defendant, to have been an implied condition, in the contract between the parties: and, as it is evident, that, without title, the ship cannot be of any value to the purchaser, because, so situated, the real owner would have a right to claim her at any time, and be entitled to recover (3), we hold the execution and delivery of a sufficient title, and the payment of the consideration, to be mutual and reciprocal engagements, to be performed at the same time.

Then, what is the title which has been tendered? It is a deed purporting to be a conveyance by Mr. Burns, the auctioneer, and by Mr. Hamilton, the consignee of the ship, to the Defendant: but it is not contended, that, by the circumstances of the case, they are enabled to convey: it is not shewn that any authority to make the transfer is derived to either of them from the owner. The consideration of the Defendant's undertaking has, therefore, failed, no valid title has been or is tendered, and the Plaintiff, therefore, has not cause of action for the sum, at which the "Star" was adjudged by him.

(1) 1 Abbott, p. 1.

(2) See *Reed*, vs. *Darby*, 10 East, 143.

(3) See *Reed* vs. *Darby*, 10 East, 143.

WILLIAMS, J : I concur in the opinion given by the chief justice: the Defendant could not send the vessel out of this port, without having previously procured a new register in his name, which could not be obtained from His Majesty's officers of the customs here, without exhibiting to them a legal transfer of the vessel (according to the requirements of the statute) vesting the property in the Defendant: and, for the want of such legal transfer made by the actual proprietor, or by some other person duly authorised by him, to execute the same in favor of the Defendant, the pretended sale of the vessel is a nullity.

KERR, J : This is an action brought by an auctioneer to recover the sum of £215, being the price for which a ship, called the "Star," and her apparel, were sold and adjudged to the Defendant, as the highest bidder at a public auction. The defence set up is that the Plaintiff has not given a bill of sale, in conformity to the requirements of the statutes of the 26th and 34th Geo. III. (1)

If ships were like chattel interests, transferred by delivery, the Plaintiff would, by the facts found in this special verdict, be entitled to recover, having put the Defendant in possession of the property adjudged. But ships, from very early times, have been like land, considered as a kind of property which must be evidenced by written documents: this was so in the French law, and is now the law of all the maritime nations of Europe. In ours, various acts of Parliament have regulated, in what manner titles shall be made to this species of property, and after reading the statutes of the 26th and 34th of the King, it is difficult to conceive how it could be supposed, that any thing like a transfer of this ship had taken place. The facts found do not conceal that Alexander Gordon is the real owner; his name appears on the face of the certificate of registry, as the person vested with the right of property in the ship, how, then, could the Plaintiff and John Dapwell Hamilton divest this property out of the owner, without a legal written authority ? Could they in conformity with the seventeenth section of the 34 Geo. III, ch. LXVIII, execute a valid indorsement on the certificate of registry?(2) The question

(1) Le ch. LX des Statuts impériaux de 1786, 26 Geo. III, intitulé : *An act for the further increase and encouragement of shipping and navigation*, et le ch. LXVIII des Statuts impériaux de 1794, 34 Geo. III, intitulé : *An act for the further encouragement of British mariners, and for other purposes therein mentioned.*

(2) Cette section est en ces termes : " Provided also, and be it enacted, that in all cases where the owner or owners of any ship or vessel shall reside in any country not under the dominion of His Majesty, his heirs and successors, as member or members of some *British* factory, or agent or agents for, or partner or partners in, any house or co-partnership actually carrying on trade in

is easily answered, that A cannot assign over the property of B without a legal procuration to that effect. And whether we consider this as a transfer or contract, or agreement for transfer of property in the ship, we are equally called on to declare it is void, and that the Plaintiff cannot recover. The 15 section declares, "that such indorsement shall, from and after the first day of January, 1795, be made in the manner and form hereinafter expressed, and shall be signed by the person or persons transferring the property of the said ship or vessel, by sale, or contract, or agreement, for sale thereof, or by some person, legally authorised for that purpose by him, her or them, and a copy of such indorsement shall be delivered to the person or persons legally authorised for that purpose by him, her or them, and a copy of such indorsement shall be delivered to the person or persons authorised to make registry, and grant certificates of registry, otherwise, such sale, or contract, or agreement, for the sale thereof, shall be utterly null and void, to all intents and purposes whatsoever." Lord Eldon, in *Woodward* vs. *Larking*, 3 Esp. Rep., 286, observes, that the policy of the Liverpool acts, was to have evidence or real property. Now here, the Defendant could have nothing but an equitable title, which, under the letter and spirit of these acts, is no title at all. It has been urged that this was a sale from necessity, and that the formalities of the register acts must, from the same cause, be dispensed with. Nothing of that kind appears on this special verdict, and, besides, where sales in a foreign port, and in extreme necessity, have been sanctioned, it has been a sale by the master, and not by a person assuming to be an authorised agent, without showing any document which gives him that power. For, is it more difficult to answer what is stated by the Plaintiff's counsel, that the vessel was sold as a hull, and not as a ship, for the transaction shows clearly, that the Plaintiff set her up to

Great Britain or *Ireland* at the time when he, she, or they shall transfer such property in any ship or vessel, so that an indorsement cannot be made immediately, nor a copy of such bill of sale, or other instrument in writing, be delivered, nor an entry thereof indorsed on the oath or affidavit, nor a memorandum thereof made in the book of registers, nor notice of the same given to the commissioners of the customs, in the manner before mentioned, the same may be done at any time within six months after such transfer shall have been made, and that within ten days after, such owner or owners, or some person legally authorised for that purpose by him, her, or them, shall arrive in this kingdom, if such ship or vessel shall then be in any port of this kingdom and if not, then within ten days after such ship or vessel shall so arrive, an indorsement shall be made by the owner or owners, or some person legally authorised for that purpose by him, her, or them, and a copy theroof shall be delivered in manner hereinbefore mentioned, otherwise such bill of sale, or contract or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed.

public sale, for the purposes of navigation; and if it were competent to dispose of ships, as hulls or wrecks, without giving any other title than possession, I fear the policy and plainest provisions of the register acts would be defeated. I am on the whole, of opinion, that the ship never was legally transferred, and that, of course, judgment must be entered up for the Defendant. (*Pyke*, p. 63.)

OBLIGATION.

COURT OF KING'S BENCH, Quebec, 20th February, 1810.

OAKLEY, against MORROGH and DUNN.

Held : That, where a third person promises to one of the parties to a contract, that he will assume it, that promise can only be binding upon him as to the person to whom the promise was made ; and a contract to deliver to certain persons, during a fixed period, all the malt that they may require for their brewery, can only be binding, as long as malt may be required for the brewery, and, therefore, the insolvency of such persons, and their ceasing to employ the brewery, terminates the contract, and no damages can be claimed, upon the ground of subsequent non-performance. (1)

An agreement was entered into by the Plaintiff and Robert Lester, and Robert Morrogh, merchants and copartners, under the firm of Lester & Morrogh, on the 27th of January, 1807, at Quebec, by which it was covenanted, by and between them, that he, Oakley, should and would make and deliver to the Cape Diamond brewery, at Quebec, such quantity of pale and brown malt from barley, as Lester & Morrogh might require, during the term of five years, which were to commence on the 1st of October, 1807, they, Lester & Morrogh, finding him with all manner of materials necessary for the making of the malt, save and except labour which was to be found by Oakley, for which he should receive three pence per Winchester bushel, after the delivery of the malt in a good state for brewing, and, for the faithful performance of this agreement, the parties bound themslves, each to the other, in the penal sum of £300.

Subsequent to this agreement, Messrs. Lester & Morrogh became insolvent, and, from the middle of September, 1808, ceased to employ Oakley as maltster, of the Cape Diamond brewery, about which time, also, Lester died, and Morrogh was apointed curator to his vacant estate.

For the non-performance of this contract, the present action was brought, by Oakley against Morrogh, as well in his own name as in his quality of curator to the estate of his deceased

(1) V. art. 1020 C. C.

partner, and against Dunn, who had become the sole proprietor of the Cape Diamond brewery, for the recovery of the stipulated penalty, and also for a further sum of £300 damages, he, Dunn, having, as alleged in the declaration, assumed and taken upon himself the said contract, and undertaken to do and perform all that Lester & Morrogh were thereby bound to do and perform.

To this action, the Defendants severally filed a défense au fonds en fait, and, at the enquête, in addition to the facts before stated, it appeared that the assumption of the contract, on the part of Dunn, if any such had taken place, to the extent alleged in the declaration, rested solely on a verbal promise, made by Dunn to Morrogh, in a conversation which took place between them, to which Oakley was not a party.

SEWELL., CH. J: The action is against Morrogh, as one of the original contracting parties, and the representative of the other (Lester), and against Dunn, as assignee of the contract. It is a contract synallagmatique (or reciprocal), by which Oakley engages, "to malt such quantities of barley, as Lester & Morrogh may require, from time to time, during the term of five years," in consideration of which Morrogh, for himself and Lester, undertakes "to furnish all the materials for making the said malt, and to pay him three pence per bushel." And to the performance of these engagements, each party binds himself to the other in the penalty of £300.

With respect to Dunn, there is no evidence that he promised at all to assume the contract, if he did promise, it was to Morrogh, not to Oakley, and, therefore, if any action lies, it must be by Morrogh against Dunn, for refusing to perform the contract as he promised. No action can lie, for Oakley against Dunn, because he (Oakley) was not a party to the contract, as to Dunn. This is evident, because Dunn had no means of compelling performance from Oakley, and, consequently, Oakley can have none to compel Dunn to perfom the contract, and he cannot, therefore, support an action for the penalty for non-performance.

As to Morrogh, the question is this, is there evidence to show that Lester & Morrogh have required any, and what quantity, of barley to be malted? And, admitting that, by *required* we must understand "required for the Brewery," there is no evidence that any was required; the sole testimony, on this point, is Morrogh's answer to the 5th interrogatory on *faits et articles*, in which he says "that the insolvency of Lester & Morrogh prevented them from continuing to employ George Oakley, from September, 1808, to the end of the contract, which clearly implies that none was required. Upon these grounds, the action, as to both, must be dismissed.

VIA SEL CONNATE

KERR, J: As it respects the Defendant Morrogh, this is an action of covenant, and, as it regards Dunn, an action of assumpsit. I do not see how an action can be maintained against the Defendant Dunn, on an agreement to which he is no party. There is no privity of contract between the Plaintiff and him, and, of course, there can be no judgment rendered against him.

With respect to the Defendant Morrogh, the contract between the Plaintiff and Lester & Morrogh must be construed according to its spirit. Now, what was the intention of these parties? It was that so long as Lester & Morrogh should carry on the brewery, at Cape Diamond, the Plaintiff should "make such quantity of pale and brown malt, from barley" as they should find necessary for brewing. But the insolvency of Lester & Morrogh, in September, 1808, and the subsequent sale of the brewery rendered it no longer necessary for their concerns to have malt made, and put an end to the contract between the parties. (*Pyke*, p. 74.)

HABEAS CORPUS.—MEMBER OF THE LEGISLATIVE ASSEMBLY.—PRIVILEGE.

COURT OF KING'S BENCH, Quebec, 17th April, 1810.

In the case of PIERRE BEDARD.

Held: That on a motion for a writ of habeas corpus, to produce the body of a person in custody (under a warrant from three members of the Executive Council for "treasonable practices") founded upon his "privilege" as a member of the Provincial Parliament, two papers purporting to be two indentures of election produced in support of the motion, are not sufficient evidence of his being such member, to entitle him to the benefit of the writ. (1)

That a member of the Provincial Parliament, held at Quebec, the place where he is resident, arrested eigheeen days after its dissolution, for "treasonable practices," and, during his confinement, elected a member of a new Parliament, is not entitled to privilege from such arrest, by reason of his election to either Parliament.

(1) Le statut provincial du Bas-Canada de 1807, 47 Geo. III, ch. XVI, décrétait, dans la sec. 14, qu'aussitôt qu'une élection serait close, l'officier-raporteur pour telle élection la proclamerait immédiatement à haute et intelligible voix aux électeurs là et alors présents, et exécuterait aussitôt, sous leurs seings et sceaux, un acte d'indenture entre lui et la personne ou les personnes élues, en la présence de trois électeurs au moins, dans la forme n° 6 de la cédule annexée à cet acte, une partie duquel acte devait être délivrée à l'instant à la personne ainsi élue ou à son représentant, et une autre partie, avec le bref d'élection, devait être transmise sans délai par le dit officier-rapporteur au greffier de la Couronne en chancellerie.

Cette forme d'acte d'indenture était en ces termes;

Cet acte fait le jour de dans l'année de Notre Seigneur mil huit cent et dans la année du règne de notre souverain seigneur George Trois, par la grâce de Dieu, roi du

A. STUART moved for a writ of habeas corpus, directed to the keeper of the common goal of the district of Quebec, to produce the body of Pierre Bedard, returnable within fourteen days, and filed the following documents, in support of his application :—1st A notice of motion to the attorney general, dated the day previous; 2nd The following certified copy of commitment: — " Province of Lower Canada to wit: "—"To the keeper of the common goal of Quebec.

" Whereas Pierre Bedard, of Quebec, barrister at law, stands charged, before us, upon oath, with treasonable practices, these are, therefore, in His Majesty's name, to require and command you to receive the body of the said Pierre Bedard into your custody, in the common goal of this district, and him safely there to keep and detain, until he shall thence be delivered, in due course of law.

" Given under the hands and seals of us, Thomas Dunn, François Baby and John Young, three of His Majesty's Executive Council, of and for the said province at the city of Quebec, in the said province, this 19th day of March, 1810, in the 50th year of His Majesty's reign.

(Signed) "Thos. Dunn," "F. Baby," "John Young."

3rd The *Quebec Gazette*, containing the prorogation of the Provincial Parliament, by His Excellency Sir James Henry Craig, then governor-in-chief, etc., on Monday, the 26th February, 1810.

4th The *Quebec Gazette*, containing proclamation, dated 1st March, 1810, dissolving the Provincial Parliament, and calling a new Parliament, writs to bear test the 12th March, 1810, and to be returnable on Saturday, the 21st day of April following, for every place but Gaspé.

Royaume-Uni de la *Grande-Bretagne* et *d'Irlande*, défenseur de la foi, etc., entre officier-rapporteur du comté (cité ou bourg) de dans la province du Bas-Canada, d'une part, et A, B, C, D, d'autre part, témoigne que, conformément à l'ordre de Sa Majesté, en date du jour de tel mois dernier (ou présent) après que la proclamation en a été faite conformément à la loi, nous les dits A, B, C, D, etc., électeurs du dit comté (cité ou bourg), à tel lieu dans le dit comté (cité ou bourg), en pleine assemblée, avons choisi F. G., comme membre ou membres pour servir pour le dit comté (cité ou bourg) dans l'assemblée de cette province qui sera tenue le jour de prochain, à Québec : Et par ces présentes avons donné et donnons au dit F. G. ample et suffisant pouvoir pour nous et les communes du dit comté (cité ou bourg) distinctement de nous, de faire et consentir à telles matières et choses qui, dans la dite assemblée, par le conseil commun de la dite province, seront ordonnées par la faveur de Dieu. En témoignage de quoi, chacune des dites parties a réciproquement apposé son seing et secau à ces présentes, les jour et an susdits.

V. art. 1207 C. C., et art. 124 à 135 inclusivement des *Statuts refondus de Québec*.

5th An indenture, dated 25th October, 1809, by which it appeared that Pierre Bedard was returned as member of the Provincial Parliament for the lower town of Quebec.

6th An indenture, dated March 27th, 1810, by which it appeared that the said Pierre Bedard was returned as a member for the county of Surrey.

A. STUART, in support of the motion, said, that this application was grounded upon the proviso of the Provincial Act, 43 Geo. III, ch. I, s. 6, which provides, "that nothing in that act should extend, or be construed to extend to invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parliament in this province," and that the question submitted to the court was, whether this proviso embraced the present case? and whether it does not destroy the force of the 4th clause, (1)

(1) Ce statut de 1803, 43 Geo. III, ch. I, est intitulé : "Acte pour la meilleure préservation du gouvernement de Sa Majesté, tel qu'il est heureusement établi par la loi en cette province", et il a été sanctionné le 11 août 1803. Il contient les dispositions suivantes :

" Vu qu'il est nécessaire de garantir et préserver les bons et loyaux sujets de Sa Majesté en cette province du Bas-Canada, contre tout attentat traître qui pourrait être formé pour renverser les lois existantes, et la constitution de la dite province, et pour introduire le système horrible de l'anarchie et de la confusion qui a si fatalement prévalu en France ; afin donc de mieux préserver le gouvernement de Sa Majesté, et d'assurer la paix, la constitution, les lois et les libertés de la dite province ; qu'il soit statué, et il est par le présent statué, que toute personne ou personnes qui sont ou seront en prison dans cette province du Bas-Canada, au jour auquel cet acte recevra la sanction royale de Sa Majesté, ou après ce terme, sur un warrant ou ordre du Conseil Exécutif de Sa dite Majesté de et pour la dite province, signé par trois membres du dit Conseil Exécutif, pour haute trahison, recellement de haute trahison, soupçon de haute trahison ou pour pratiques traîtresses, pourront être détenues sous sauvegarde, sous caution ou cautionnement durant la continuation du présent acte ; et que pour et durant la continuation de cet acte, aucune cour ou cours, juge ou juges, magistrat ou magistrats de la paix ne recevront à caution ou ne feront le procès d'aucune telle personne ou personnes ainsi commises, sans un warrant ou ordre à cet effet du dit Conseil Exécutif de Sa Majesté, signé de trois membres du dit Conseil Exécutif, nonobstant toute loi, statut, acte ou ordonnance à ce contraire.

II. Et qu'il soit de plus statué que pour et durant la continuation de cet acte, il ne sera loisible à aucun juge ou juges à paix dans cette province, ou dans aucun district ou partie d'icelle, de cautionner ou admettre à caution aucune personne ou personnes accusées du crime de haute trahison, ou recellement de haute trahison, ou soupçon de haute trahison, ou de pratiques traîtresses, nonobstant toute loi, statut ou ordonnance à ce contraire.

III. Et qu'il soit de plus statué que pour et durant la continuation de cet acte, dans tous et chaque cas où demande sera faite du writ d'*habeas corpus* de Sa Majesté, à aucune cour ou cours, juge ou juges dans cette province, ou dans aucun district ou partie d'icelle, par aucune personne ou personnes qui sont ou seront en prison dans cette province, au jour auquel cet acte recevra la sanction royale de Sa Majesté, ou après ce terme, accusées de haute trahison, recellement de haute trahison, soupçon de haute trahison ou de pratiques traîtresses, tel writ d'*habeas corpus* (s'il est accordé par telle cour ou cours, juge ou juges) ne sera point fait retournable dans moins de quatorze jours à compter du jour auquel tel writ d'*habeas corpus* sera ainsi accordé ; et dans tous et chaque tels cas, il sera du devoir de tels cour ou cours, juge ou juges, et de tous et de chacun d'eux, et ils sont par le présent

The House of Assembly must, of necessity, have those privileges which are essential to its very existence. To ascertain what those priviliges are, we must look to the House of Commons in England, where the applicant would undoubtedly have been entitled to his privelige. Parliamentary privilege, as to the freedom from arrest, not only exists during the actual sitting of Parliament, but extends to forty days after a dissolution. There are but three cases to which it does not extend, treason, felony, and an actual breach of the peace. The charge against the applicant comes under neither of these descriptions. "Treasonable practices" are not treason: they possess, indeed some of the qualities of treason, but are entirely destitute of other essential qualities necessary to constitute treason. As for example, in the case of Sydney, among whose private papers were found some writings of a treasonable tendency; but they had neither been published, nor did any intention of publishing them appear. So also, in the case of a person preparing to make communications to the King's enemies, without having taken any steps to carry his intention into effect. In both cases will be found "treasonable practices," but in both, the overt act, absolutely essential to constitute treason is wanting. "Treasonable practices" are certainly not felony, nor do they amount to an actual breach of the peace. This is a commitment for "treasonable practices," and commitments must at all times be construed strictly. The offence cannot be constructive, it must be an actual breach of the peace. The charge, therefore, not coming under any of the three exceptions, the applicant ought not to be barred of his

requis toutes fois et du moment que telle demande pour tel writ d'*habeas corpus* leur sera respectivement faite, de donner avis et information d'icelle par écrit, ensemble avec copies de telle demande et de la déclaration ou des déclarations sous serment, et des autres papiers sur lesquels telle demande sera fondée, au gouverneur, lieutenant-gouverneur ou à la personne ayant l'administration du gouvernement pour le terme d'alors.

IV. Pourvu toujours, et qu'il soit statué, que tel writ d'*habeas corpus* ou le bénéfice d'icelui ne sera point alloué par telle cour ou cours, juge ou juges à aucune autre personne ou personnes détenues en prison au terme de sa ou de leur demande pour tel writ d'*habeas corpus*, en vertu de tel warrant ou ordre du dit Conseil Exécutif de Sa Majesté comme susdit, pour telles causes comme susdit, ou aucunes d'elles; et que dans tous et chaque cas où tel writ d'*habeas corpus* sera accordé, aucune cour ou cours, juge ou juges ne cautionneront ou n'admettront à caution la personne ou les personnes à qui tel writ d'*habeas corpus* sera accordé, si, par le retour fait de tel writ d'*habeas corpus*, après l'expiration de quatorze jours, à compter du jour auquel tel writ d'*habeas corpus* est ainsi accordé, il paraît que telle personne ou personnes soient alors détenues en prison, en vertu de tel warrant ou ordre du dit Conseil Exécutif de Sa Majesté comme susdit, pour telles causes comme susdit ou quelqu'une d'elles, nonobstant toute loi, statut, acte ou ordonnance à ce contraire.

VI. Pourvu toujours, et qu'il soit statué, que rien en cet acte s'étendra et ne sera censé s'étendre à gêner et restraindre les justes droits et privilèges légaux d'aucune branche du parlement provincial en cette province.

privilege. The case of Wilkes is in point, who was arrested for having published an infamous and seditions libel. (1) He was brought before the Court of Common Pleas by a writ of habeas corpus, and claimed the privilege of Parliament: Lord chief justice Pratte (alterwards Earl Camden) was of opinion that he was entitled to his discharge, and discharged him. Upon the point of privilege, the applicant claims as well upon the ground of having been a member of the late, as of having been elected a member of the new Parliament. (2)

The ATTORNEY GENERAL (Uniacke) contra. Before the counsel for the applicant can avail himself of the argument he has made use of, he must distinctly establish what are the privileges of the members of the House of Assembly of Lower Canada. The present question is, whether an express act of Parliament is to be evaded by extending to the members of the Provincial Parliament, all the privileges of the members of the Imperial Parliament?

This cannot be the case; because it is no where to be found that such privileges have been extended to them: nor have any such been given to them by the constitutional act. Every traitorous attempt is treason; nor is it necessary that treasonable designs should be ripe for execution, and have actually commenced their operation, to bring them under the denomination of treason; nor does privilege any more extend to treasonable practices than to treason itself. The argument founded upon the case of Wilkes must fall to the ground.—For the House of Commons solemnly disavowed the decision of the Court of Common Pleas in the very same year in which it had been made (1763); and the House of Peers, five days subsequent to the resolve of the Commons, passed a similar resolution. Of late years the privileges of the House of Commons have been much curtailed, and if the question before the court were now raised in England, the applicant would, most certaintly, not be allowed his privilege. (3) Indeed there is no instance of a member being allowed privilege in a criminal case: neither is the charge against the applicant for a supposed or constructive offence.

The warrant of commitment shows it to be a charge of "treasonable practices" upon oath, and this charge unquestionably includes a breach of the peace. It would surely be

(1) 2 Wilson, 151.

(2) *Holiday & al.* vs. *Colonel Pitt* (Strange, 985) was cited to prove that the privilege of Parliament extends to a certain period after a dissolution. Also 1 Siderfin, 42; 1 Hatsell's *Precedents*, 163; and Bacon, under the word privilege to show that a person already in custody is entitled to claim his privilege as soon as he is elected.

(3) 1 Hatsell, 200, and 5 Bacon, 631, n° 4.

absurd to say, that in the case of a common assault upon an individual, a member of the Legislature shall not be privileged and yet, that on a charge of "treasonable practices" affecting the welfare and tranquillity of the whole population of a country, he may claim and have his privilege. The obvious intent of the privilege of Parliament is to protect a member from the sufferance of wrong, not to enable him with impunity to commit wrong; "it must not be used for damage to the commonwealth."

The ADVOCATE GENERAL (Perrault), on the same side: This question is not without difficulty. By the 4th clause of the statute, 43 Geo. III, ch. I, all persons, accused of certain offences therein specified, are divested of the right to sue out a writ of habeas corpus. The counsel on the opposide side has fallen into an error in the application of the two authorities he has cited. The decision of the Court of Common Pleas, in the case of Wilkes, was against every principle of law (1) and was formally disclaimed by the British Parliament. The privilege of Parliament extends only to civil cases; there exists no precedent of the extension of it to indictable offences, of which description is the offence the applicant is charged with. The spreading false and malicious reports against the government must be considered as a breach of the peace. The writing and publishing seditious libels, also, is an offence not entitled to privilege, which is taken away in all criminal cases. The case of *Holiday* vs. *Pitt*, was entirely a civil case, and therefore not applicable to the present question.

The warrant of commitment is sufficient proof that the offence with which the applicant is charged is an indictable offence, and is, therefore, sufficient ground for the court to reject the present application for a writ of habeas corpus.

BOWEN, on the same side: Should the argument in support of the motion be admitted, the House of Assembly might be composed of fifty traitors, and no remedy be had against them; it would be to say, that under the shield of privilege, might be found protection and security from the consequences of criminality. But before entering into the consideration of "what may be the privileges of the Provincial Parliament," let us examine whether the applicant, at the time of his arrest, could be considered as a member of that Parliament, or was entitled to claim any lawful privilege that may attach to that character. For this purpose it is necessary to advert to dates. The prorogation of the Provincial Parliament took place on Monday, February 26th, 1810. The proclamation, dissolving the House of Assembly, issued on Thursday, 1st of March.

(1) 1 Black Com., 165, 166, and IV, 149.

The writs for a new election bear teste on Monday, March 12th. The arrest of the applicant was on Monday, March 19th, and he is said to have been elected one of the members for the county of Surrey, on Tuesday, March 27th. It is very material to keep these dates in view, for the principles of this application are, that the applicant is entitled to obtain his writ on two grounds: 1° as having been a member of the late Provincial House of Assembly; 2° as having been elected a member of the new Provincial House of Assembly; and, as such, entitled to his privilege. He ought not to succeed on the first ground, because, if we refer to English authorities, it will be found that the period after a session, during which a member of Parliament is privileged, for the purpose of his erturn home from the performance of his public duty, is a reasonable time for that purpose, and not, as has been argued, forty days. And this was decided in the case of Martin (1). The case cited of *Holiday* vs. *Pitt*, only shows that the members had privilege, after a prorogation or dissolution, so long as they were paid, that is to say, till they reached their own houses. Eighteen days had elapsed between the dissolution of the late Parliament, and the arrest of the applicant; and can it be seriously argued that this was not a reasonable and sufficient time for him to go from the House of Assembly to his own house, when both are in the same city? If he could have claimed any privilege, therefore, it could only have been the privilege of a single day. He must fail on the second ground also, because, at the time of his arrest, he was not a member of any Parliament; and, consequently, the 4th clause of the provincial act, cited by the counsel for the applicant in opening his case, is in full force and effect, and is a perfect bar to his claim of those privileges referred to in the proviso, be they what they may. The case of Wilkes has been cited to show, that as the applicant has been elected, since his confinement, a member of the new Parliament, he is entitled to privilege. But the decision of the court, in that case, has long ceased to be recognized as law; and was set aside by the Parliament itself.

The privilege of a member of the House of Commons commences only at his election; " but if he be arrested, or taken in execution, before his election, he shall not have privilege. " (2) But, even here, the reference is only to civil suits: how then can it be contended that privilege exists, previous to election, in criminal cases? In England, members of Parliament are privileged from arrest in all cases, treason, felony, or breach of the peace only excepted (3). The 6th clause of

(1) See Martin's case, in 1586.

(2) 5 Bacon 631.

(3) 4 Ins., 25.

the statute 43, Geo. III, ch. I, says, that nothing in this "act shall invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parliament; " and the question necessarily arises: what are the lawful rights and privileges of the third branch of the Legislature of Lower Canada? Are they, in every respect, the same with those immemorially enjoyed by the House of Commons in England? Most assuredly not. Where then shall we find them enumerated, or by what means can we trace them out? The act of the 31st Geo. III., ch. XXXVII, by which the Legislature of Lower Canada was created, and by which our constitution is given to us, defines and limits that constitution. Will the court admit that the Provincial Legislature is entitled, under that act, to all the privileges of the Imperial Parliament? It is impossible. A member of the Provincial House of Assembly can claim no privileges, but such as are there given him. In that statute is comprised our whole constitution; that statute forms our only charter.

A. STUART, in reply:

When I first made this application to the court, I was under a strong impression that, in point of law, it ought to be granted: and this impression has been matured to perfect conviction by the arguments adduced by the counsel who have opposed the motion. They have founded their arguments on an assertion the most questionable. They deny that the House of Assembly has any privileges whatever; although those privileges have been constantly claimed and recognized, are inherent in every legislative body, and are essential to its very existence. But it is said that they are neither mentioned, or defined, in the act of the 31st of the King. I know no reason why a more strict rule of construction should be applied to this statute than to any other, but I can conceive many strong ones why it should receive a more liberal construction than an act which perhaps solely relates to and regulates mere private rights. It follows a fortiori, that the British Parliament, in granting to this country a Provincial Legislature, granted also those necessary privileges without which that Legislature could have no political existence. It would be difficult and Sir William Blackstone thought it would be inexpedient, to define with accuracy the extent of parliamentary privilege. The privileges of the Imperial Parliament are not fixed by, nor to be found in any statute. The authorities, cited by the attorney general from Hatsell, prove, what I have urged, the necessity of members of Parliament being free to proceed to the performance of their public duties. If it were true that the House of Assembly have no privileges, it would be in the power of the

other branches of the Legislature to annihilate it. And, if it have privileges, from whence can we derive so correct information of their nature and extent, as from the British House of Commons itself? But it has been said that, in England, a member of the House of Commons confined upon a charge of treasonable practices would not be entitled to privilege. The dictum of Sir William Blackstone, cited in support of this assertion, is contradicted by the decision of the Court of Common Pleas in Wilke's case, and by the law authorities referred to by chief justice Pratte. The resolutions of the two Houses of Parliament, consequent upon this decision, were passed in times not the most calm, and are not entitled to carry the same weight with them that the decision of chief justice Pratte carries. "Treasonable practices" may exist, and yet the party not be guilty of an indictable offense. If the principle be admitted that privilege never extends to any case of a criminal nature, why are treason, felony, and breach of the peace alone specifically excepted? If the provincial act of the 43rd of the King is to be construed in the manner contended for by the counsel for the Crown, the proviso is altogether nugatory. The case of Martin has been cited, to show that privilege extended to a reasonable time only, after a prorogation. In that very instance, twenty days were considered to be a reasonable time: yet it is cited as an authority to show that eighteen days are more than a reasonable time. The case of Pitt incontrovertibly establishes that the privilege of Parliament extends as well to a certain period after a dissolution, as after a prorogation. I will conclude with repeating my former observation, that in the present case, privilege is claimed upon the double principle of the applicant having been elected, and being at the present moment, a member of the new Provincial Parliament as well as that he was a member of the late Provincial Parliament.

PER CURIAM:

SEWELL, CH. J.: We are fully satisfied that the motion cannot be granted. The facts which constitute the case before us are few in number. The late Provincial Parliament was dissolved by proclamation on the first of March last, and, by the same proclamation a new Parliament was summoned to meet on the 21st of April.

On the 19th of March Mr. Bedard was arrested, and committed to the common goal of this district, by a warrant under the hands and seals of three members of the Executive Council for "treasonable practices," and the object of the motion before us, is to release him from confinement upon the grounds that he served in the last Parliament as a representa-

tive of the city of Quebec; that on the 27th of this present month, he was elected to serve in the same capacity for the county of Surrey in the new Parliament, and therefore that he is entitled to his discharge by reason of his privilege as a member of the House of Assembly. The commitment of Mr. Bedard is made under the authority of the Provincial Statute, 43rd Geo. III, ch. 1, which authorizes the detention of every person committed by warrant, signed by three of the Executive Council for high treason, misprision of high treason or "treasonable practices" without bail or mainprize, during the continuance of the act. It is however, provided, by the sixth clause of this statute, "That nothing in the act contained shall extend, or be construed to extend, to invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parliament" and it is contended that Mr. Bedard is within the letter of this exemption. But to bring this case within this proviso, it is obvious, that in the first instance he must be proved to be a member of the Legislative Council, or of the House of Assembly; and in point of fact, there is no evidence of either. We have nothing indeed, before us, but two papers, which we are told are indentures, executed between Mr. Bedard and the electors of the city of Quebec, and of the county of Surrey. I say "told" because of this assertion no proof whatever has been offered, nor is any thing adduced, from which the authenticity of these papers can in any way be inferred. In the case of John Wilkes, there was a formal admission (1) on the part of the King's sergeants, that he was a member of the House of Commons; and, upon that admission the proceedings of the Court of Common Pleas were founded. In this case, there is no such admission, and as there is a total absence of every thing which, by law, we are permitted to receive as evidence of the fact upon which this claim of exemption is entirely built, we must necessarily, for this defect alone, reject the motion. I should be sorry, however, to have it supposed that this court concedes what has been argued, viz., "That there is privilege of Parliament against arrest for treasonable practices," or to have it believed that we should hold ourselves bound by law, in any future instance to admit a claim of privilege against arrest under circumstances similar to the present. The circumstances to which I allude (assuming all facts to be as they have been stated) are the arrest of Mr. Bedard, eighteen days after the dissolution of the last Parliament, and his election to the new Parliament, during his confinement. If Mr. Bedard was entitled to privilege upon the day of his arrest (the 19th of March), it

(1) 2 Wilson, 151.

is evident (as he was not elected for the county of Surrey until the 27th day of March), that his right to it must be solely founded on the fact of his having been a member of the last House of Assembly; and if he was not entitled to privilege upon the day of his arrest, then, it is equally evident, that his claim to privilege must be entirely founded upon his election to the new Parliament. In England, the privilege from arrest is claimed and allowed to every member of the House of Commons, *veniendo, morando, et exinde ad propria redeundo* (1) and extends to forty days after every prorogation, and to forty days before the next appointed meeting (2). But although, to the effect which has been stated there are several legal decisions, yet it does not appear that any precise period, for the duration of this privilege after a dissolution has been fixed. Prynne is of opinion, that it continues for the number of days during which (after a dissolution) a member formerly received wages (3) and those wages were in proportion to the distance between his residence and the place where the Parliament was held. (4) Upon this principle in the case of *Holliday* vs. *Pitt* (5), which has been cited at the bar, it was held by all the judges that this privilege extends only to a convenient time after a dissolution, that is, to a sufficient time to enable the member, with convenience, to return home. Now, the last Provincial Parliament met in Quebec, in the very place for which Mr. Bedard was returned a member, and in which he resides; and as, therefore, it is impossible to say that he had not a convenient time for his return home, for transporting himself from one to another part of Quebec, between the first and the nineteenth day of March, it is clear that the day on which he was arrested was not within the period to which the privilege of the last Parliament extended. Let us now examine whether this claim can be supported under the privilege of the new Parliament. There is certainly a material difference between the election of an individual who is at large, and the election of one already in confinement, which is the present case. In the former instance, the electors, having chosen a free man, are without blame, and ought not to be deprived of his services by any act of his, to which the privilege of Parliament extends; in the latter, they make choice of one who visibly is not in a situation to perform the services which they require of him,

(1) 4 Ins., 46, folio edition

(2) 2 Lev., 72.

(3) 4 Parl. Writs, 68.

(4) Stat. 35 Hen. VIII, ch. XI.

(5) Strange, 985, and Fort., 159.

and they have therefore only themselves to blame if they are deprived of them. In England again, upon these principles, it has been decided that the privilege of a member of the House of Commons from arrest commences at his election, (1) unless he has been arrested, or be in execution before his election, in which case it has also been decided, that he is not entitled to privilege (2) Freedom from arrest, in all cases to which privilege legally extends, may be considered to be as indispensably necessary to the existence of a Provincial House of Assembly, as to an English House of Commons. But there is no principle upon which it should be admitted in this province under circumstances which are held in England to be such as must exclude it. It is argued that "there is privilege of Parliament from arrest for treasonable practices", and to support this assertion it is contended that this privilege extends to all offences except treason, felony and breach of the peace (which may be admitted) and that treasonable practices do not amount either to treason, to felony, or to breach of the peace. The court is of opinion that "treasonable practices" are within the meaning of the words "breach of the peace", and that the privilege from arrest does not extend to cases of this description. All indictable crimes (and all treasonable practices must be indictable) are held in law to be contra pacem domini regis; and upon this ground, in England, it is now understood that the claim of privilege does not comprehend the case of any indictable crime. Such being the opinion of the court, we are not called upon to make any enquiry as to the distinction between treason and treasonable practices. It may be well, however, to observe, after what has been argued, that the precise import of the phrase "treasonable practices" has never been settled by any legal decision, and if by the word "practices" we are to understand "acts," it certainly will be difficult to mark the line of destinction. In the course of the argument, to show that "treasonable practices" are entitled to privilege, the case of John Wilkes has been entirely relied on. It has been said, that by this decision it was settled that a member of Parliament charged with having written and published a seditious libel was entitled to privileges; and from thence it has been inferred that a member, charged with "treasonable practices" must also be entitled to his privilege. Now, admitting this case for the present, to be law, it by no means follows because a seditious libel is entitled to privilege, that treasonable practices must also be entitled to it. If indeed, the latter was the minor offence of the two, it might be infer-

(1) 4 Bacon, fol. ed., 233.

(2) 2 Siderfin, 42 R. in Parl., 12th March, 1592.

red; but this is not the case, for in point of fact, it is the major and not the minor offence. To constitute treason, there must be an actual design against the King or his government in contemplation; and it is in this that it is distinguishable from sedition, which comprehends such offences (not being capital) as are of like tendency, but without any actual design against the King or his government. A charge therefore of doing a thing seditiously cannot amount to a charge of high treason; since that which is seditious, and no more, can only partake of the nature of sedition. But, for the same reason, that which is treasonable must partake of the nature of treason, and consequently be a crime of greater magnitude than any act which is merely seditious. The case of Wilkes then, if admitted to be law, proves that the privilege of Parliament extends thus far, that is, to seditious acts, but affords no proof whatever that it extends beyond them to "treasonable practices. But the decision in the case of John Wilkes the court cannot receive as law, because it has been solemnly disclaimed by both Houses of the British Parliament. The judgment, in this well known case (pronounced May 3rd, 1763) at the first meeting of Parliament afterwards, was taken into the consideration of both Houses, and the discussion ended on the 29th Nov., 1763 in a joint vote, by which it was resolved, "That the privilege of Parliament doth not extend to the case of writing and publishing seditious libels nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence" (1) Let the order therefore be, "that he take nothing by his motion."

WILLIAMS, J.: I shall not touch upon all the points that have been so ably stated by the chief justice. In the case of Wilkes it was the admission of the counsel for the Crown, that established the fact of his being a member. In the present case there is no such admission; nor is there any evidence before the court that Mr. Bedard either was, or is, a member of the Provincial Legislature. The decision of lord Camden was certainly not correct; nor can it be received as legal authority;—for the offence with which Mr. Wilkes was charged was clearly an indictable offence.—The members of the House of Assembly of Lower Canada are, without doubt, entitled to the enjoyment of their lawful privileges, which ought not to be invalidated or restrained. But what are those privileges? They are those which are granted them upon the claim made by their speaker, at his presentation to the King's represen-

(1) Comm. journ., 24th Nov., 1763; Lord's journal, 29th Nov., 1763; Almons' Deb. Com. for 1763.

tative for approval, after his election to that office. The principal of which are "freedom of speech," for the purpose of managing their debates; and "freedom of person" during the session of Parliament, and while going to and returning from thence in order to enable them to perform their public duty there. I entirely agree in opinion with the chief justice that the motion cannot be granted.

KERR, J.: I do not think it necessary to give any opinion upon the important questions raised in the course of the argument upon this motion. The first point submitted to our consideration, is whether the two indentures supposed to be the returns of Mr. Bedard as a member of the last House of Assembly and of the present are sufficiently proved, or in other words, if his counsel has offered legal evidence of his being within the exception contained in the 6th section of the Provincial Statute. I am entirely of opinion with the chief justice, that we have not evidence of his being a member of the last, or of the present Parliament, and consequently, we have not now to decide whether a member of the Assembly has his privilege in the case of "treasonable practices." I will not follow this question then *ab omnibus quærenda*, but should it come regularly before the court, we must not shrink from the execution of our duty. It is sufficient for me to state, that I agree in opinion with the court, that this motion ought not to be granted.

Motion denied. (*Stuart's Rep.*, p. 1.)

COURT OF VICE-ADMIRALTY.—PROHIBITION.—RIVER ST. LAWRENCE.

COURT OF KING'S BENCH, Quebec 20th February, 1811.

HAMILTON and another, against FRASER and others.

Held: That a prohibition may issue from the Court of King's Bench, to stay proceedings in the Court of Vice-Admiralty. That a suit for salvage of a ship stranded on a sandbank, in the river St. Lawrence, the *locus in quo* being *infra corpus comitatus*, was not one of Admiralty jurisdiction, and a prohibition was granted to stay further proceedings therein. That the *river St. Lawrence*, from the west end of Anticosti to the eastern line of the district of *Three Rivers*, is within the district of Quebec.

In this case, a rule was obtained calling on the Defendants to show cause why a writ of prohibition should not issue, to stay proceedings, in a certain suit, in the Court of Vice-Admiralty, brought by the present Defendants, for work and labour, in the salvage of a certain ship and cargo, at the Batture of *Mille Vaches*, in the *river St. Lawrence*.

SEWELL, CH. J., delivered the opinion of the court:

Upon mature consideration, we are of opinion that the motion must be granted, and a prohibition awarded to the Court of Vice-Admiralty. This decision will restrain the Court of Vice-Admiralty from the exercise of a jurisdiction to which it has formally laid claim, and we are on this account desirous to make the principles of our judgment distinctly known, I shall, therefore take occasion to state them, but as the present is the first case in which a prohibition has been awarded to the Court of Vice-Admiralty out of this court, I shall show in the first instance the power and the authority of the Court of King's Bench to award this writ. Every court of limited jurisdiction must be subject to control, for where there is no control there can be no limited jurisdiction. In England, all such courts (and among them the Admiralty,) are superintended and restrained within the proper bounds of their authority, by the superior courts of Westminster Hall. And, in the King's colonies, in America, the same power, with respect to the Courts of Vice-Admiralty, has been exercised by the superior courts of common law. In *Key & Hubbard* vs. *Pearse*, (1) Pearse libelled in the Vice-Admiralty Court of New York, and, the plea of *Key & Hubbard* to the jurisdiction being refused, they obtained from the Court of King's Bench of the province a writ of prohibition. The issue in the cause was, "whether the ship seized was prize or no prize," a question over which the Court of Admiralty holds an unequivocal and exclusive jurisdiction, and it was accordingly determined at the cockpit, that the prohibition had been improperly issued, but the general authority of the provincial Court of King's Bench, to award the writ of prohibition, was not at all doubted. The lord chief justice Lee, in delivering the judgmend said :—

" As this is a question upon prize, I think the common law court had no right to prohibit," and lord Mansfield, (referring to this decision) afterwards said, in the case of *Lindo* vs. *Rodney:*

" This case (*Key & Hubbard* vs. *Pearse*) was argued, and could only be argued as a mere question of law, just as if it had arisen in Westminster Hall upon a capture in the river Thames, within the body of a county. The courts of law in the colonies prohibit the Court of Admiralty just as the Courts of Westminster Hall do here." (2) The power of prohibiting the Court of Vice-Admiralty when it exceeds the limits of its jurisdiction, must then be vested in some or other of His Majesty's ordinary courts of law in this province,

(1) Douglas, 608.

(2) Douglas, 619, in notis ; 2 Chalmers' opin. 207, 215.

and as the Court of King's Bench and of Appeals are the only courts of ordinary jurisdiction in the province, we have to inquire in which of them it is vested. For this purpose it must be remarked that the distinction between the writ of prohibition and the writ of appeal is essential. When a court has jurisdiction, and gives a wrong sentence, that sentence is the subject matter of appeal, and not of prohibition; but if it has no jurisdiction, prohibition is the legal remedy. The writ of appeal removes the cause into the superior tribunal for investigation upon the merits of the case itself in reference to the parties and their respective rights. The writ of prohibition does not remove the proceedings, nor does it lead to any investigation of the merits, except in so far as they tend to elucidate the question of jurisdiction. Now the jurisdiction of the Court of Appeals is limited by statute (1) and extends only to causes appealed from civil jurisdictions wherein by law an appeal is allowed, so that the Court of Appeal cannot take cognizance of the proceedings of the Admiralty, unless it be by writ of appeal, and it is certain that no appeal is by law allowed from any decision of the Court of Vice-Admiralty, except to the High Court of Admiralty in England, or to the Court of His Majesty in privy council (2). It follows that the provincial Court of Appeals has no jurisdiction whatever with respect to the Admiralty. A writ of prohibition to the Admiralty cannot, therefore, issue out of that court, and consequently must issue out of the Court of King's Bench. To what I have said upon this part of the subject, I shall add that the power and authority of this court to award the writ of prohibition, and to award the writ of certiorari (which we daily issue), stand in principle upon the same ground. Both writs are designed for the control of limited tribunals to restrain and keep them within the true bounds of their respective jurisdictions, and both are equally necessary for preserving inviolate the legal destribution of judicial authority (3).

The general question which arises out of the facts set forth in the suggestion and the affidavits fyled in support of it, is this: "Whether the Court of Vice-Admiralty has jurisdiction in a case of salvage arising and entirely completed within the limits of the province?" And we are of opinion, as already intimated, that it has not. The ground of this opinion shall

(1) 34 Geo. III., ch. VI, s. 23.

(2) 3 Black. Com., 69.

(3) The "Appel comme d'abus" and the "défense d'exécuter," are in fact prohibitions. See the introduction to the edition of Denizart, by Le Camus, 73 L. C. Den., *verbo* défense d'exécuter, s. 1, n° 1, 2 and 3, vol. VI, p. 77 and 78.

now be shown, and to this end, certain propositions, on which we rely, shall be stated with the authorities on which they are founded.

We hold then, as a general rule, 1. that, according, to the civil and maritime law of England, the High Court of Admiralty of England cannot hold plea of any matter arising within the jurisdiction of the ordinary courts of law; and that it cannot hold plea of any matter arising within the limits of the realm, or kingdom of England, because the limits of the jurisdiction of the ordinary courts of law, are co-extensive with the limits of the realm; 2. that certain cases are exceptions to this general rule, but that salvage arising and completed within the jurisdiction of the ordinary courts of law, is not one of the excepted cases; 3. that the provincial Court of Vice-Admiralty has no greater or other authority than that of the High Court of Admiralty of England. It will follow from these propositions (when established) that, as the High Court of Admiralty of England cannot, so the provincial Court of Vice-Admiralty cannot hold plea of any matter of salvage arising and completed within the jurisdiction of the ordinary courts of law, and consequently that the provincial Court of Vice-Admiralty cannot hold plea of any matter of salvage arising and completed within the limits of the province, if the limits of the jurisdiction of the ordinary courts of law of the province be co-extensive with the limits of the province. I proceed to the consideration of the first proposition :—

It is laid down as a general rule that the jurisdiction of the instance Court of Admiralty of England is confined to matters arising on the high seas. (1)

It is true that it does not seem to be agreed what shall be taken to be the high seas in all cases, but it is equally true that a river, creek or haven within the limits of any country, constituting a part of the realm or kingdom of England, is clearly held not to be a part of the high seas, and that the instance Court of Admiralty cannot take cognizance of any matters made or done in any such river, creek or haven, because all matters arising there may be heard and determined in the ordinary courts of law (2). "It is a rule," says McDouall, "in the law of England, that the Admiral's jurisdiction is confined to matters arising on the high sea, and, therefore, he cannot take cognizance of contracts, etc., made in any river, haven or creek, within England for those are triable by the common law." (3) By the statute,

(1) 1 Bacon, 623.

(2) 1 Bacon, 623.

(3) 2 McDouall's ils., 543

13 Rich. II, ch. v, it is enacted, "that the admirals and their deputies shall not meddle, from henceforth, of anything done within the realm, but only of a thing done upon the sea." By the statute, 15 Rich. II, ch. III, it is enacted, "that of all manner of contracts, pleas and quarrels, and all other things rising within bodies of counties, as well, by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction, but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties, as well by land as by water as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before, nor by the admiral, nor his lieutenant in any wise," and by the statute, 2 Henry IV, ch. XI, it is enacted as follows, viz.: "Whereas in the statute made at Westminster the 13th year of the said king Richard, amongst other things it is contained, that the admirals and their deputies shall not intermeddle, from thenceforth of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble king Edward, grand father to the said king Richard; our said lord the King will and granteth that the said statute be firmly holden and kept and put in due execution," Such are the statutes, which according to Stamford, are to be considered as statutes declaratory of the common law. "Per common ley (says he) *devant le statut, anno 2do Henrici IV, ch.* XI, *l'admiral n'avé jurisdiction, sinon sur le haut meer,*" and, by a series of decisions, the provisions which they contain, are adjuged to be the law civil and maritime of England. In Cradock's case, it was said "the intent of the statute, 13 Rich. II, was to prevent the Admiral's Court from holding plea of anything happening within the realm," and a prohibition was granted. (1) In *Leigh* vs. *Burley*, a prohibition was awarded, because, *per Curiam:* "the contract was made on land and *infra corpus comitatus*, and, therefore, the admiral can have no jurisdiction, for the statutes, 13 and 15 of Richard II, and 2d Hen. IV, ch. XI, are that the admiral shall not have conusance but of things done *super altum mare*, and *Cook* (justice) said, when a place is covered over with salt water and is out of any county or town, there, *est altum mare*, but where it is within any county, there, it is not *altum mare*: and trial shall be per *vicinitum*.(2) In the case of the lord *Admiral* vs. *Linsted*, the suit was instituted in the Admiralty for a ship as flotsam, left near an harbour in Norfolk, and it

(1) 2 Brownlow, 37.

(2) Owen, 122.

was agreed that flotsam ought to be tried in the Admiralty; but a prohibition was ordered *per Curiam*, "Because, the suggestion was" that the dereliction was *infra corpus comitatus*. (1) In the case of *Culliver & Brand*, a ship was wrecked by tempest in a creek of the sea, "*Infra corpus comitatus* of Dorset." The sailors, upon pretence that the goods in the ship were *bona peritura*, procured a commission of sale out of the Court of Admiralty, whereupon the owners, to prevent the sale "brought a *supersedeas*," and, upon producing the libel to the court, a prohibition was granted, "because the cause of action did arise *infra corpus comitatus* and so the Admiralty cannot hold plea thereof." (2) In *Coke's report* of the anonymous case in the reign of Edward I, it is said, the sea within the jurisdiction of the admiral is out of every county, for, if the sea be in any county then pais may come from thence. The admiral hath jurisdiction when the common law cannot give remedy. (3) Upon the reference made in the 7th of Jac. I, in the case of *sir Richard Hawkins*, vice-admiral of Devon, to the chief justices of the King's Bench and Common Pleas, and to the chief baron of the Exchequer, it was, by them resolved "that, by the common law, the admiral ought not to meddle with anything done within the realm, and only with things done upon the sea, and this, say they, appeareth fully by the statutes, 13 Rich. II, ch. v, and 2d Hen. IV, ch. xi. (4) In further proof of the present proposition, I refer to the cases which are cited by "the judges of the realm," in their answers to the *articuli Admiralitatis* (5) of which the first answer is as follows: "By the laws of this realm, the Court of the Admiral hath no conusance, power or jurisdiction of any man, nor of contract, plea or querele, within any county of the realm, either upon the land or the water, but every such contract, plea or *querele*, and all other things rising within any county of the realm, either upon the land or the water, and also, wreck of the sea, ought to be tried, determined, discussed and remedied by the laws of the land, and not before, or by the admiral, nor his lieutenant, in any manner, so as it is not material whether the place be upon the water *infra fluxum et refluxum aquæ*, but whether it be upon any water within any county. Wherefore, we acknowledge that of contracts, pleas and *quereles*

(1) Siderfin, 178, p. 9.

(2) 2 Sid., 81.

(3) 12 Rep., 80.

(4) 13 Rep., 52.

(5) 4 *Inst.*, 136-147.

made upon the sea, or any part thereof, which is not within any county, the admiral hath and ought to have jurisdiction, and no precedent can be shown, that any prohibition hath been granted for any contract, plea or *querele* concerning any maritime cause done upon the sea, taking that only to be the sea wherein the admiral hath jurisdiction, which is before by law described to be out of any county. (1) In later times the same opinion has uniformly been held in the courts of Westminster Hall. In the Common Pleas, in *Ross* vs. *Walker*, (2) Ross who was a pilot, was sent for to Gravesend to come on board the ship Oxford, being in sea reach, who accordingly went on board of her there, and piloted her from thence to her moorings at Deptford, and for his wages due to him upon that account, he instituted a suit in the Admiralty, upon which a prohibition was moved for, upon a suggestion, that both the contract and the work done, were within the body of the county, and an affidavit that sea reach is within the body of the county, and a prohibition was ordered, and *per Curiam:* "There is no instance to be found where the contract was at land and to do the work on board within the body of some county, that the common law courts have ever permitted the Admiralty to have jurisdiction." (3) In *Velthusen* vs. *Ormsley*, (4) on the authority of the decision in *Violet* vs. *Blague*, (5) it was admitted on both sides, that the Admiralty had no jurisdiction in the case, because the running fore and breaking of the Libellants' vessel had happened on the Thames, within the county of Kent, and a prohibition was accordingly awarded by lord Kenyon, and the Court of King's Bench, and, in delivering the judgment of the same court, in *Lindo* vs. *Rodney*, lord Mansfield said, "the view, purport and tendency of the statutes is to prevent the Admiralty from trying matters triable at common law. These statutes don't exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action, it must be done on the high seas, if done in ports, havens or rivers, within the body of a county of the realm, the Admiralty is excluded." (6) From these authorities it is certainly clear as a general rule, that the High Court of Admiralty of England has no jurisdiction over any matters

(1) 4 Just., p. 134.

(2) 2 Wils., 265.

(3) 2 Wils., 265.

(4) 3 T. Rep., p. 315.

(5) Cro. Jac., 514.

(6) Douglas, 615.

arising within the realm, and that the reason of this rule is that such matters having arisen within the jurisdiction of the common law courts must there be tried.

It is admitted by our second proposition that "certain cases are exceptions to this general rule," but we hold that "salvage arising and completed within the jurisdiction of the ordinary courts of law, is not one of the excepted cases" sueing for mariners' wages founded on contracts and for money due upon hypothecation bond: which have been executed within the jurisdiction of the ordinary courts of law, are familiar instances of such exceptions, confirmed by the recent decisions in *Howe & Napier*, (1) and *Menetone & Gibbons* (2) which have been cited at the bar. But, of these exceptions the former is said (by lord Mansfield), in the case of *Howe & Napier*, to be founded on services performed at sea (3) and the latter is said by Powell (justice) in the case of *Johnson* vs. *Shepney* (4) to be founded on the principle that the master must have power to take up money during a voyage upon hypothecation to supply the necessary wants of his ship occasioned by stress at sea (5). But independent of these considerations it must be remembered, that the proof of one exception is no evidence of the existence of another. Our inquiry is whether salvage arising and completed within the jurisdiction of the ordinary courts of law be also an exception? And if it be, it was incumbent on the Libellants to show it, and this they have not done; not a single authority of any description has been produced to contradict, in this respect, the general rule or the assertion of Abbott, "that the Admiralty has jurisdiction if the *salvage* be performed at sea" (6) and not otherwise.

I proceed to show 3. that the provincial Court of Vice-Admiralty has no greater or other authority than that of the High Court of Admiralty of England. The Courts of Vice-Admiralty in the British American colonies are branches of the jurisdiction of the admiral of England, and appeals from the decisions of these vice-courts are, therefore, brought before the High Court of Admiralty of England, not only in ordinary cases, but even in revenue cases, in which a jurisdiction is given to them by statute without any provision whatever for appeals (7). In this province, as in all others

(1) 4 Burr., 1944.

(2) 3 T. R., 269.

(3) 4 Burr., 1950.

(4) 6 Mod., 79.

(5) Ib., *Lister* vs. *Baxter*, Str., 695.

(6) Abbott, 2 ed., 357.

(7) 2 Robinson's *Rep.*, 246-248, note *a*.

belonging to His Majesty, the judge of the Court of Vice-Admiralty holds his office by commission from the High Court of Admiralty of England, by which, under the seal of that court, he is appointed "commissary in Lower Canada." It might, therefore, be sufficient to say, that as the Courts of Vice-Admiralty are thus emanations of the High Court of Admiralty of England, their jurisdiction cannot exceed that of the court from whence they originate. The inferior cannot possibly be more than equal to the superior, nor can the deputy (and they are deputies of the admiral) possess more power or authority than the principal from whom their whole power and authority is derived. I shall, however, have recourse to the commission by which the judge of the Court of Vice-Admiralty in this province is appointed, which I find, upon research, to have been uniformly the same from the conquest to the present time (1). By that commission, the power granted to the "commissary" or judge of the provincial Court of Vice-Admiralty, is, "to take cognizance of, and proceed in all causes," civil and maritime, and in complaints, contracts, etc., and such causes, complaints, contracts, and other the premises above said, or any of them (however the same may happen to arise, be contracted, had or done), to hear and determine according to the civil and maritime laws and customs of the High Court of Admiralty of England (2).

And this to me is conclusive, for since the same rule must necessarily obtain in all courts whose proceedings are governed by the same laws and customs, it is plain that the provincial Court of Vice-Admiralty can have no greater or other authorities, power or jurisdiction, than that of the High Court of Admiralty; therefore, as the civil and maritime laws and customs of the High Court of Admiralty do not enable it to take cognizance of any case of salvage except such as arise on the high seas, the same rule must here obtain in the Court of Vice-Admiralty, and as according to the same civil and maritime laws and customs, any place which is within the limits of the jurisdiction of the ordinary courts of law is not part of the high seas, it follows that neither the High Court of Admiralty, nor the provincial Court of Vice-Admiralty can lawfully take cognizance of any case of salvage arising in any such place. It is set forth in the libel that the salvage was

(1) Records in the office of the secretary of the province.

(2) "By this commission (says the report of the governor and council of Quebec, to His Majesty, drawn by baron Mazeres, the attorney general, in 1769), it is evident Your Majesty has introduced into this province all the laws of Your Majesty's English Court of Admiralty in *lieu* of the French laws and customs by which maritime causes were decided in the time of the French government." (*Mazeres'* Collection, p. 19.)

performed on the high seas. But, by the suggestion it is averred, and by the affidavits filed with the suggestion it is sworn, that it was performed at the Batture of Mille Vaches, within the district of Quebec, within the jurisdiction of this court and not elsewhere."

In *Ross & Walker*, it was said by the court:—"It is and must be laid in the libel that the contract and the work were both on the high seas, yet we must now take the suggestion to be true, and that both the contract and the work were at land." (1) It is not therefore, necessary, perhaps, at this time to show why the Batture of Mille Vaches (which is the *locus in quo* in this case, and is upwards of one hundred miles above the west end of the island of Anticosti), is within the limits of the district of Quebec, and within the jurisdiction of the court. But, as we deem it right, in a case of this description, to state fully the entire grounds of our opinion, I shall do so, and for this purpose I shall detail in chronological order, the several public instruments and acts, which relate to the boundaries of this province and to the limits of the three districts of which it is composed. Having first premised, that by the 2nd clause of the Provincial Statute, 34 Geo. III, ch. VI., this court has original jurisdiction and power in this district, "To take cognizance of, hear and determine all causes, as well civil as criminal, except those which are purely," that is, exclusively, "of Admiralty jurisdiction."(2) The first instrument in order is the royal proclamation of the 7th of October, 1763, which thus describes the government of Quebec, "bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river, through the lake St. John, to the south end of the lake Nepissim, from whence the said line crossing the river St. Lawrence and the lake Champlain in forty-five degrees of north latitude, passes along the high lands which divide the

(1) 2 Wils. *Rep.*, 265.

(2) La sec. 2 de ce statut de 1793, qui est intitulé : "Acte qui divise la province du Bas-Canada, qui amende la judicature d'icelle, et qui rappelle certaines lois y mentionnées," est en ces termes : "Il sera constitué et érigé dans chacun des dits districts de Québec et Montréal, respectivement, une cour qui sera dénommée Cour du Banc du Roi ; la Cour du Banc du Roi pour le district de Québec, consistera du juge en chef de Sa Majesté pour la dite province et de trois juges puisnés, et la Cour du Banc du Roi pour le district de Montréal, consistera du juge en chef de Sa Majesté pour la dite cour et de trois juges puisnés ; et les dites cours, dans les districts respectifs susdits, auront une juridiction originelle, prendront connaissance, ouiront, procéderont et détermineront, dans la manière ci-après statuée, toutes causes, tant civiles que criminelles, et dans lesquelles le Roi est partie, excepté celles purement de juridiction d'Amirauté, et celles qui sont ci-après exceptées et pourvues pour le district inférieur de Gaspé, comme partie du dit district de Québec."

V. art. 28 C. P. C.

rivers that empty themselves into the said river St. Lawrence from those which fall into the sea, and also along the north coast of the Baie des Chaleurs and the coast of the gulf of St. Lawrence to Cape Rosiers, and from thence crossing the mouth of the river St. Lawrence by the west end of the island of Anticosti, terminates at the aforesaid river St. John." The next act is the statute, 14 Geo. III, ch. LXXXIII, usually called the *Quebec Act*, by which it is enacted, "That all the territories, islands and countries in North America belonging to the crown of Great Britain, and bounded as therein described, and all such territories, islands and countries which have since the tenth day of February, 1763, been made part of the government of Newfoundland, be, and they are hereby, during His Majesty's pleasure, annexed to and made part and parcel of the province of Quebec, as created and established by the said royal proclamation of the 7th October, 1763. "The next instrument in succession is the order of His Majesty in his privy council of the month of August, 1791, by which under the power reserved to him by the 14th of Geo. III, ch. LXXXIII, recognized in the statute, 31 Geo. III, ch. XXXI, he divides the province of Quebec into two distinct provinces to be called the province of Upper Canada and the province of Lower Canada, by separating the said two provinces according to the following line of division, that is to say, "to commence at a stone boundary, on the north bank of the lake St. Francis at the cove west of *Point au Baudet*, in the limit between the township of Lancaster and the *seigneurie* of New Longueuil, running along the said limit, in the direction of north thirty-four degrees west to the westernmost angle of the said *seigneurie* of New Longueuil, thence along the north-western boundary of the *seigneurie* of Vaudreuil running north twenty-five degrees, east, until it strikes the Ottawa river, to ascend the said river into the lake Tomiscanning, and from the head of the said lake by a line drawn due north, until it strikes the boundary line of Hudson's bay."—There are no other public instruments or acts, which relate to the boundaries of this province, except those which I have cited, and from these it is evident that the river St. Lawrence upwards from its mouth, that, is, from a line drawn at the west end of the island of Anticosti, from cape Rosiers on the south shore to the mouth of the river St. John, on the north shore, was originally included within the limits and constituted a part of the province of Quebec, as created and established by His Majesty's proclamation of October, 1763, and that all which constituted the province of Quebec so created and established is now the province of Lower Canada, except what forms the

province of Upper Canada which commences at the line of division declared by His Majesty's order in council of the month of August, 1791, some miles above the city of Montreal.

As to the limits of the district of Quebec it is necessary only to refer to the first section of the Provincial Statute, 34 Geo. III, ch. VI, by which it is enaced, " that the province of Lower Canada shall consist of three districts, to be called the district of Quebec, the district of Montreal, and the district of Three Rivers; that the district of Quebec shall be bounded to the westward by the eastern line of the *seigneurie* of d'Orvilliers, as far as it extends, and thence by a due north-west line to the northern boundary of this province, on the north side of the river St. Lawrence, and by the eastern line of the *seigneurie* of *Saint-Pierre les Becquets* as far as it extends, and thence by a due southeast line to the southern boundary of this province on the south side of the river St. Lawrence, *and the said district of Quebec shall comprehend all that part of this province which lies to the eastward of the before mentioned western boundary line of the said district.*" From these public instruments and acts it is apparent that the Batture of Mille Vaches being very far above the west end of the island of Anticosti, and as the line drawn from Cape Rosiers, to the river St. John, is within the limits of this province of Lower Canada, and being also very far below the eastern lines of the *seigneuries* of d'Orvilliers and *St-Pierre les Becquets*, is also within the limits of the district of Quebec, so that all causes there arising are *infra corpus comitatus* and within the jurisdiction of this court.

If the parties in this case are not satisfied with this opinion, they know that they are not bound by the present proceedings, it is, particularly, in the power of the Libellants, to compel the Respondents to declare in prohibition, to perfect an issue upon the matters contained in the suggestion, to obtain the judgment of this court on that issue, to appeal from that judgment to the provincial court of appeals, and ultimately to obtain the decision of His Majesty, in his privy council, upon the whole case.

RULE ABSOLUTE. (1) *(Stewart's Rep.*, p. 21.*)*

(1) Since this decision, prohibitions have been awarded in the Court of King's Bench, at Quebec, in the following cases:—*Murphy* vs. *Wilson*, in 1822, for an assault and battery in a foreign port; *Jones* vs. *Howard*, the case of the *Camillus* for damage done by collision in the port of Quebec, in 1823; *Willis* vs. *Soucy*, for pilotage in the river St. Lawrence, in 1827; *Garret* vs. *Morgan*, master of the "Onandago," 12th June, 1834, for the recovery of a capitation tax paid in Ireland; *Hurley and another* vs. *Short*, for a loss of passenger's goods, at Grosse Isle, June, 1834.

In a statute passed in the United Kingdom, 2 Will. IV, ch. LI., intituled

ACTION OF DAMAGES.—MALICIOUS ATTACHMENT.

COURT OF KING'S BENCH, Quebec, 8th April, 1811.

WHILFIELD and COATES, against HAMILTON and another.

Held: That it is not necessary, in Canada, in an action for a malicious arrest of property, to set forth, in the declaration, that the action in which the arrest was made has been terminated (1)

This was an action of damages for a malicious arrest of the Plaintiffs' property by attachment or *arrêt simple*. The Defendants demurred to the declaration, and BOWEN and FLETCHER, in support of the demurrer, contended that no action for a malicious arrest, lies before the action in which the arrest was made is determined, and that the declaration ought, therefore, to have set forth that the action instituted by the Defendants against the Plaintiffs, had been terminated, that the determination of the former suit was required for such lights as it might happen to afford in evidence on one side or the other, and to prevent contradictory judgments (2) also that the declaration was defective in this further respect, that it did not aver, that no debt was due by the Plaintiffs to the Defendants, when their property was arrested, so that the former admitted a probable cause for the arrest, but that the want of a probable cause and malice were both necessary to complete the action. (3)

PERRAULT, on the other side, insisted that there was no

"An act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction," the following clause is contained :—"Whereas, in certain cases, doubts may arise as to the jurisdiction of Vice-Amiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage and droits of Admiralty; be it therefore enacted, that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court, notwithstanding the cause of action may have arisen out of the local limits of such court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits." This enactment does not seem to remove, in any way, the doubts therein referred to. It would have been desirable that this clause of the statute had been more clear and explicit than it is. No question has yet arisen in the courts here upon the construction to be given to it.

(1) V. art. 13 C. P. C., et art. 1053 C. C.

(2) *Fisher* vs. *Bristow*, 1 Doug., 215; *French* vs. *Atkinson*, Will's, 517; *Morgan* vs. *Hughes*, 2 T. R., 225, and *Kirk* vs. *French*, 1 Esp. N. P., ch. LXXX.

(3) *Sutton* vs. *Johnstone*, 1 T. R., 493; *Godin* vs. *Wilcock*, 2 Wils., 305; *Parton* vs. *Horner*, 1. *Bos & Pull*, 205.

analogy between the cases cited and the present case. That, in England, and in that class of cases to which the Defendants had referred, the gist of enquiry was the existence of the debt sworn to, but that, in this case, the enquiry would be whether the Plaintiffs, when their property was seized, were about to abscond, or otherwise to defraud their creditors; and that if the Defendants had maliciously laid such an intention to their charge without any probable cause and the Plaintiffs had sustained damage, it was plain that they must recover the amount of such damage whether a debt was or was not due by them; and, therefore, it was unnecessary to allege, in the declaration, that the former action had been determined: and as it had been determined that contradictory affidavits could not be filed, to rebut the effects of an affidavit for an arrest of the person, and the same rule must necessarily obtain in cases of attachment by *arrêt simple* of property, there could not be contradictory judgments.

SEWELL, CH. J: It is undoubledly true that, in an action for a malicious arrest, in England, it must appear, and must therefore be alleged in the declaration; that the former suit in which the Plaintiff was arrested is terminated by a judgment of *non pros.*, a verdict or discontinuance. (1)

In this case, the arrest was of the Plaintiff's property, for which, if is was malicious, an action certainly lies in the law of Canada. (2) But it is essential to remark that the grounds on which the process of arrest is here obtained, are not the same as in England: there, it is obtained on the affidavit of the Plaintiff, in which he swears that a debt is due to him, and no more, so that the question of malice or no malice turns entirely on the existence of the debt. Here, for the arrest of property, it is obtained on the affidavit of the Plaintiff who not only swears to his debt but swears also that the Defendant intends to abscond, or depart the province, or to secrete his effects *for the purpose of defrauding his creditors*, and the question of malice or on malice turus, sometimes, on the enquiry whether the Plaintiff had good cause to charge the Defendant with such a fraudulent intention, sometimes, on the existence of the debt, and, sometimes, on both. In many cases then, the debt may be due, and yet the arrest be malicious; as for instance, where the Plaintiff has charged the Defendant with a fraudulent intention to abscond when he well knows that he had no such intention, and in such cases, quoad the action, it is immaterial whether the debt was due or not, although it may be material *quoad the*

(1) 1. Esp. N. P., ch. LXXX; 2 Esp. Dig., 531.

(2) 2 Domat, 218, *Supp., au Dr. pub.*, lib. III, tit. II, art. 4.

quantum of damages; and it cannot be necessary to show, either on the face of the declaration, or in evidence, that the former suit, in which the arrest was made, has been terminated. This may be the case in the present instance, for aught we can say, and the demurrer must, therefore, be dismissed.

Demurrer dimissed. (*Stuart's Rep.*, p. 40.)

ARBITRATION.—ARBITRATORS.

COURT OF KING'S BENCH, Quebec, 10 April, 1811.

MEIKLEJOHN *vs.* YOUNG, and another.

Held: That upon a reference to three arbitrators, or, specifically to any two of them, an award by two is good, if the third has had due notice of the matters referred and of the several meetings; but if the reference be to three generally, all should be present at the meetings, specially when the award is made, and then the award of two is valid, even if the third refuses to assent to it. (1)

A rule was obtained for the homologation of an award of certain arbitrators who had been appointed by the parties in this case to decide upon all matters in difference between them. The reference had been made to three arbitrators, and although the three had heard the parties and were all present, when the award was made, two only had signed it, and the third had refused. The cause shewn against this rule was that the reference was general to three persons, and that the award, by two only, was no award, that every award must quadrate with the terms of the submission, the whole authority of the arbitrators being derived from thence and founded on the consent of the parties. On the other side, it was insisted that the award was good although the reference has been to three generally. (2)

PER CURIAM: When a reference is made to three arbiters, or specifically to any two of them, an award by two of the persons named is good, provided the third has due notice of the several meetings appointed, and of the several matters referred to them, and this is law, because it is the plain intent of the submission; (3) but when the reference is to three generally, not only notice of all the matters referred and of the meetings is necessary, but, moreover, it is required,

(1) V. art. 1346 et 1351 C. P. C.

(2) 2 L. C. Den., *verbo* arbitrage, 242; 2 Dict. de Droit, *verbo* sentence arbitrale, 606; Rép. de Jur., *verbo* arbitrage.

(3) See Will. *Rep*, 215; and Jousse, *Traité des Arbitrages*.

that the three arbiters should be present at the meetings, and particularly when the award is made; yet, if all these requisites are complied with, the award of two is sufficient, even where the third refuses his assent to it. As in the public tribunals of justice, so in the private tribunals which the parties elect for themselves, the sense of the majority prevails. (1)

Award homologated. *(Stuart's Rep.*, p. 43.*)*

INCIDENTAL DEMAND.—EXCEPTION TO THE FORM.

COURT OF KING'S BENCH, Quebec, 20 April, 1811.

TURNER and others *vs.* WHITFIELD.

Held: That if an incidental Plaintiff does not on the face of his declaration shew that his demand is connected with the demand in chief, the Defendant must avail himself of this omission by an exception as to form; if he does not, but answers, he waives the irregularity of the proceedings and admits that he is *rectus in curiâ.* (2)

To an incidental cross demand, fyled by the Defendant in this cause, the Plaintiff in chief pleaded the general issue, and demurred to the incidental Plaintiff's declaration.

BOWEN, for the incidental Defendants (*Turner et al.*), contended that this cross demand must be dismissed, as the incidental declaration did not, upon the face of it, shew any relation or connection between the demand in chief and the incidental demand. (3)

SEWELL, CH. J : An incidental cross demand is a demand instituted by the Defendant in a suit, against the Plaintiff, for some cause of action connected with the matter put in litigation by the demand in chief, and in some way accessary to it, It is a mode of defence to a demand in chief, to which a Defendant resorts in cases where by the rules of pleading he cannot avail himself of the matter of his defence in any other way. (4) If, therefore, an incidental Plaintiff does not, on the face of his declaration, make it appear that his demand is connected with the demand in chief, and arises *ex eodem fonte*, the incidental Defendant may take advantage of his omission as a *fin de non procéder*, by an exception as to form; but, if, instead of so doing, he answers the demand

(1) 1 Louet, 149; L. C. Den., *verbo* arbitrage, paragraphe 3, n. 2; 1 *Prat. fran.*, 131-4; Henrys, 547; Jousse, *Tr. des Arbitrages*, n° 56, 60.

(2) V. art. 116 et 151 C. P. C.

(3) 1 Pig., 338; —*Mure* vs. *Lafleur*, K. B. Q., 1810, n° 41.

(4) 1 Pig., 338; Jousse, *Tr. des Présidiaux*, 69, 74; Serpillon, 149.

against him, he waives the irregularity of the proceeding, and voluntarily submits the cause to the jurisdiction of the court, which he is permitted to do, *unicuique licet juri pro se introducto renunciare.* By answering, he allows himself to be *rectus in curiâ*, and admits "that he ought to answer," and he cannot, therefore, afterwards plead that he ought not to answer. The incidental Defendant in this case has answered the demand against him, by pleading the general issue, and a demurrer, both of these pleas are answers *au fonds*, or, to the merits: the former is an answer to the facts stated in the libel of the declaration, the latter, to the conclusions. The truth of the facts stated in the libel being denied by the general issue, and the legality of the conclusions by the demurrer. As the import of the demurrer amounts to this only: "That the conclusions cannot be granted, because taking all "the facts stated to be true, they do not amount to a legal "cause of action;" the question, whether the incidental Plaintiff (supposing the facts stated in his demand, to be a legal cause of action), can avail himself of them, in the form and manner in which he has instituted his suit, is not before us; and, it is right to observe, that it ought to have been put (if it was intended to put it), by an exception as to form, because it is the proper province of an exception as to form, to shew, "that by reason of some imperfection, defect, or want of form in the proceedings, as in the writ, or declaration, the court cannot proceed in the cause, nor compel the Defendant to answer." (1) Then as the matter stands, the merits of the incidental demand in fact and in law, being solely before us, and not the form and manner in which this demand has been instituted, we can only decide upon the former; and being of opinion that the facts stated in the libel of this declaration, if true, amount to an efficient cause of action, and, consequently, that the conclusions are legal and properly taken,

The demurrer must be overruled; and proof upon the issue of fact ordered. (2) (*Stuart's Rep.*, p. 46.)

(1) *Forbes* vs. *Atkinson*, K. B. Q., 1810.

(2) This decision was affirmed in appeal, in July, 1813.

PARTNERSHIP.—DISSOLUTION.

COURT OF KING'S BENCH, Quebec, 20th April, 1811.

On appeal from Montreal.

GEORGE SYMES, Appelant, and DANIEL SUTHERLAND, curator to PATRICK ROBERTSONT'S vacant estate, and NEIL ROBERTSON, Respondent.

Held: That the dissolution of a partnership without particular notice to persons with whom it has been in the habit of dealing, and general notice in the *Gazette* to all with whom it has not, does not exonerate the several members of the partnership from payment of the debts due to third persons not notified and who contracted with any of them, in the name of the firm, either before or after the dissolution (1).

This was an appeal from a judgment of the Court of King's Bench, at Montreal, rendered in favor of the Respondents.

PER CURIAM: By the law of England where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm, (2) for a secret dissolution cannot discharge the partners. It must be promulgated to the world in the usual and ordinary way, by *particular* notice to all who have had previous dealings with the firm, and *general* notice to all who have not through the medium of the *Gazette* (3). The same rule obtains in the law of France, and so long ago as the year 1564, was recognized in a judgment of the Parliament of Paris upon a secret dissolution of a copartnership of the 20th November of that year (4) reported by *Charondas.* "Il faut," says this judgment, "que celui qui ne veut plus être associé fasse signifier à tous ceux avec lesquels il avait coutume de contracter ou de négocier pour le fait de la société, la dissolution d'icelle; autrement il demeurerait obligé envers eux; même qu'il la dénonce par proclamation et affiches publiques à ceux qui lui sont inconnus."—It must not, however, be presumed that knowledge of the fact of dissolution acquired by other means is insufficient, for if there be an absolute knowledge of this fact in the party contracting with the firm at the time of the

(1) V. art. 1900 C. C.

(2) *Parkin* vs. *Caruthers et al.*, 2 Esp. N. P., p. 248; *Willet* vs. *Chambers*, Cowp. 814.

(3) *Graham* vs. *Hope*, Peake's *nisi prius*, 154; *Gorham* vs. *Thompson*, Ib., 42; *Godfrey* vs. *Turnbull*, 1 Esp. N. P., 371.

(4) Charondas, *Pandect.*, lib. IV, ch. XIII; 2 Bornier, 469; Poth., *Soc.*, n. 157.

contract made it is enough. He can never be said to have contracted with the firm upon the faith of those persons whom he knew to be no partners in it, and consequently knew to be no parties to his contract.

In the present case, as the Plaintiff's agent (*Cuvillier*), by whom the sale was made, has been examined by both parties, and has distinctly sworn that he had no knowledge of the dissolution of the copartnership in 1801, or of Neil Robertson having retired from the house; the sole inquiry is whether such steps were taken at the time of dissolution or since, by the Robertson or either of them, that notice to the Plaintiff may fairly be inferred, and his want of the knowledge of Neil Robertsons having retired from the copartnership attributed to the Plaintiff's laches? Now, the facts of this case, as they appear in evidence, are these:—1. that there was no alteration in the style of the firm, and the fair inference is, that it continued to be composed of the same persons;—2. that regular notice was given to the creditors in England, and yet a similar notice was not given to the creditors here;—3. that no public notice of the dissolution was given here or elsewhere;—4. that so late as March, 1807, three of the principal merchants of Montreal had no knowledge of Neil Robertson having retired from the partnership, although the dissolution took place as far back as 1801, and acquired their knowledge of this circumstance at that time by private and particular application to Patrick Robertson, on the behalf of some of the creditors of the house in England, to know who were the partners in the firm of *Patrick Robertson & Co.* Against such a weight of testimony notice to the Plaintiff cannot be inferred, nor can we attribute the want of the knowledge of *Neil Robertson* having retired from the firm to any other cause than to the laches of *Neil Robertson* and *Patrick Robertson*, of which they cannot avail themselves. A dissolution, it is proved, did take place; but this is not a dissolution in point of law, with regard to third persons, unless they have been notified thereof. So far from the change being of public notoriety, upon which alone the question rests, we find that fact rebutted by the evidence. We have gone through the record, more than once, and, upon mature deliberation, are clearly of opinion that the judgment of the court below must be reversed with costs, and that judgment must now be entered up for the Plaintiffs, for the sum demanded by the declaration. Judgment reversed. (*Stuart's Rep.*, p. 49.)

ATTACHMENT BEFORE JUDGMENT.—CAPIAS.—CONTESTATION.

COURT OF KING'S BENCH, Quebec, 10th June, 1811.

BARNEY *vs.* HARRIS.

Held: That any irregularity in an affidavit to attach property cannot be taken advantage of by an exception as to form. In case of any irregularity in suing out a *capias ad respondendum*, a motion to discharge the Defendant from the sheriff's custody, for want of a sufficient affidavit to hold to bail, and not an exception as to form, is the mode of taking advantage of such irregularity. (1)

In this case an attachment was sued ont against the Defendant's property, but the affidavit being considered as irregular by the Defendant, he fyled an exception as to form.

It was argued for the Defendant, that an exception as to form was the proper course of proceeding; and, for the Plaintiff, the contrary was maintained upon the authority of the case of *Patterson* vs. *Hart*. (2)

PER CURIAM: The pleading which has been called an "exception as to form," is not a *fin de non procéder*, as to the *instance*, which every true exception to the form is. It does not shew that the court cannot compel the Defendant to answer the demand, but, on the contrary, it shews that not-

(1) V. art. 116, 819 et 854 C. P. C.

(1) In this case of *Patterson* vs. *Hart*, determined in the Court of King's of Bench at Quebec in 1811, the Defendant was held to bail upon an insufficient affidavit, and an exception as to form founded on the irregularity of the proceedings in this respect, was fyled upon the return of the process. For the Defendant, it was maintained to be the most proper mode of taking advantage of the alleged irregularity; *sed*,

PER CURIAM: This exception must be dismissed. Every exception as to form is a *fin de non procéder*, and must, therefore, shew that the court cannot legally proceed on the Plaintiff's demand, or compel the Defendant to answer to it in any manner. (*Vide* the case of *Forbes* vs. *Atkinson*, in 1810, K. B. Q.) Now a *capias ad respondendum* is two fold, it contains a summons which requires the Defendant to answer the demande of the Plaintiff set forth in the declaration and annexed to the writ, and it directs the sheriff to take the body of the Defendant, and to keep him in his custody, until he gives bail to the action. The exception pleaded in this case certainly shews that the Defendant has been improperly taken into the sheriff's custody, and that he is entitled to his discharge from that custody for want of a sufficient affidavit, but it does not shew that the court cannot proceed in the cause before them, because it does not at all impeach either the regularity of the summons to answer, contained in the *capias*, or the form of the demand set forth in the declaration. It is the collateral proceeding to obtain bail or security, which is affected by the matter which is pleaded, and not the principal proceeding to obtain judgment for the sum demanded; and, consequently, the court can proceed in this action, as in all others instituted by summons.

A motion to discharge the Defendant from the custody of the sheriff, for want of a sufficient affidavit to hold to bail, is the proper course in such cases as the present. Exception dismissed.

withstanding the allegations which it contains, the Defendant must answer, for the objection which it urges relates merely to the security, which, by virtue of the attachment, has been taken, to answer the demand, and not to the demand itself, or to any part of it. The case of *Patterson* vs. *Hart*, is perfectly analogous, although the security there taken was upon a *capias ad respondendum;* and the principle for which the Plaintiff now contends, although it was not decided, was fully recognized in the case of *Barlow* vs. *Richardson.* (1) Exception dismissed. *(Stuart's Rep.*, p. 52.*)*

COMMERÇANT.—LETTRE DE CHANGE.—CAPIAS AD SATISFACIENDUM.

COURT OF KING'S BENCH, Quebec, 2th October, 1811.

GEORGEN *vs* MCCARTHY.

Held: That the drawer of an inland bill of exchange is, *quoad hoc*, a merchant, and a *capias ad satisfaciendum* may be had upon a judgment thereupon obtained against him, under the ordinance, 25 Geo. III, ch. II, s. 38. (2)

(1) K. B. Q. in 1810.

(2) La sec. 38 du ch. II des ordonnances du Gouverneur et du Conseil législatif de la province de Québec de 1785, 25 Geo. III, est en ces termes : " Pour l'exécution de tous jugements donnés pour affaires de commerce, entre négocians et négocians, et marchands et marchands, et aussi pour dettes à négocians et marchands, pour marchandises et effets vendus, il sera non seulement décerné une exécution contre les biens meubles et immeubles du Défendeur ; mais aussi une prise de corps, dans les cas où ses biens ne produiraient point le montant de la requête du Demandeur, et il sera pris et détenu dans les prisons du district, jusqu'à ce qu'il ait payé le montant du jugement, nonobstant toutes lois, coutumes et usages à ce contraires. Pourvu que si le Défendeur, après avoir resté un mois dans la prison, s'adresse à la cour, et fait une attestation sous serment qu'il n'a point dix livres vaillant, le Demandeur paiera au Défendeur la somme d etrois schellings et demi par chaque semaine, pour sa subsistance, pendant tout le temps qu'il sera détenu dans la prison à sa poursuite ; et, dans le temps de disette, la dite Cour des Plaidoyers communs pourra augmenter, suivant sa discrétion, la dite somme, qui n'excédera point un schelling et demi de plus par semaine. Tels paiements seront faits en avance, tous les lundis de chaque semaine, à faute de quoi, la cour dont la prise de corps aura été décernée, ordonnera que le Défendeur soit élargi ; mais le Demandeur ne sera point obligé de faire tels paiements, s'il prouve, à la satisfaction de la cour par qui le Défendeur est détenu, qu'il a diverti, ou sequestré ses effets en fraude de ses créanciers.

Par la sec. 1 du ch. XLII des statuts du Canada de 1849, 12 Victoria, il fut décrété que " aucun bref de *capias ad satisfaciendum*, ou autre exécution contre la personne ne sera décerné ni accordé après la passation de cet acte."

Cette disposition du statut de 1849 est reproduite dans la sous-sec. 3 de la s. 7, du ch. LXXXVII des S. R. B. C. Voir aussi l'art. 2271 C. C.

Cette cause n'a plus d'actualité au point de vue du capias, vu que le *capias ad satisfaciendum* est aboli, comme susdit, mais elle est reproduite, surtout à cause de la note qui contient un résumé de certaines dispositions importantes de l'ancien droit sur la contrainte par corps, et aussi à cause de sa portée quant aux parties à un billet promissoire.

Les dispositions actuelles de notre droit relatives à l'emprisonnement en matières civiles se trouvent aux art. 2271 à 2277 C. C., inclusivement.

The Plaintiff had obtained a judgment, against the Defendant, for the amount of an inland bill of exchange, of which he was the drawer, protested for non-payment, and, upon a return of *nulla bona*, the Plaintiff moved for a *capias ad satisfaciendum*.

PER CURIAM: *A capias ad satisfaciendum*, in the terms of the ordinance (1) may be had for the satisfaction of all judgments given in commercial matters, between merchants and traders. A foreign bill of exchange, in the law of France, is considered to be an act of trading in money. (2) The bill itself, therefore, is a commercial matter, and the parties concerned in it must be traders; and upon these principles, in this court, in the case of *Ewing Bowie* vs. *Skinner*, (3) a *capias ad satis-*

(1) 25 Geo. III., ch. II, s. 38.

(2) 2 Poth., 107.

(3) In this case which was determined in June, 1809, the Plaintiffs had obtained a judgment against the Defendant, an officer in the army, upon a bill of exchange, drawn by him, in their favor, upon London, and returned under protest for non payment. A writ of *fieri facias* was sued out against his goods and chattels, lands and tenements, upon which the sheriff having made a return of *nulla bona*, a rule for a *capias ad satisfaciendum* was obtained and served on the Defendant, who did not appear.

SEWELL, CH. J., said that imprisonment after judgment for the satisfaction of all, and of any debts without distinction as to their nature, was originally the law of France, and herein it differed from the law of England. (Harbert's case, 3 *Coke's Rep.*, p. 12.) And this continued to be the rule in France, until the year 1254, when, by the ordinance of St. Louis it was abolished, except in cases of debts due to the Crown. (Vide *Traité du domaine*, par Lefevre de la Planche, vol. III, p. 297.) By the 48th article of the ordinance *de Moulins* which passed in the year 1566, the old law was re-enacted, and the *contrainte par corps* was again allowed, in all cases and against all persons, after the expiration of four months from the day on which a copy of the condemnation or judgment was served upon the person against whom it was pronounced. (Traité du domaine, vol. III, p. 297). The 57th art. of the ordinance de Blois, afterwards exempted persons in holy orders from the operation of this clause, and, ultimately, by the Code Civil, certain other characters were also exempted, and it was enacted generally that the *contrainte par corps*, except in certain cases, should not be allowed. Says this ordinance: "Défendons à nos cours et à tous autres juges de condamner aucun de nos sujets par corps en matière civile, si non, et en cas de réintégrande, pour délaisser un héritage en exécution des jugements, pour stellionat, pour dépôt nécessaire, consignation faite par ordonnance de justice, ou entre les mains des personnes publiques, représentation de biens par les séquestres commissaires ou gardiens, *lettres de change*, quand il y aura remise de place en place, dettes entre marchands pour faits de marchandises dont ils se mêlent." It was the intention of the framers of the Code Civil to have continued the liability of Defendants to imprisonment in satisfaction of debts as it then stood, but the King intimating his desire that it should be abolished, a new title was prepared which is the 34th, as it now stands. (See the *procès-verbal* des conférences on the Code Civil, p. 423 et seq.) This article is the 4th of the 34th title, and was the law of Canada, at the conquest, the redaction of the Code Civil in 1678, having introduced it without change, and no alteration having afterwards taken place in it. By the law, therefore, as it stood at the conquest, and is recognized by the *Quebec Act*, which, with great propriety, may be called the common law of Canada, this motion for a

faciendum was awarded against Skinner, who was an officer in the army. We cannot see that there is ground for any distinction between an inland and a foreign bill of exchange, and there was none in France. (1) The motion must, therefore, be allowed.

Ca. Sa. ordered to issue. (*Stuart's Rep.*, p. 53.)

EXCEPTION A LA FORME.—NOMS DES PARTIES.

COURT OF KING'S BENCH, Quebec, 8th October, 1811.

JONES, curator, *vs.* MCNALLY.

Held: That misnomer cannot be pleaded by an exception as to form. (2)

capias ad satisfaciendum or *contrainte par corps*, must be allowed, unless the Plaintiff's right to it has been taken away by some act of the Legislature, subsequent to that event. Now the 14th and 22nd sections of the ordinance, 17 Geo. III, ch. II, and the 36th, 37th and 38th sections of the ordinance, 25 Geo. III, ch. II, are the only clauses of acts passed since the conquest which bear upon this point. The 30th section of the ordinance, 25 Geo. III, ch. II, in the words of the 14th section of the ordinance, 17 Geo. III, ch. II, directs that the writ of execution, in all cases, "shall set forth" the judgment of the court between the parties, and the kind of execution *which the law*, according, as the case may be, shall direct, whether the same be to take the body or to levy a sum of money out of any one's goods and chattels, lands and tenements, or to do any special matter or thing whatever." But the reference here made, being to the law generally and not to these ordinances particularly, it cannot be said that the provisions of the 4th article of the 34th title of the Code Civil (which at the passing of the ordinance, 17 Geo. III, were certainly in force), have been abrogated by this clause. Then as to the remaining clauses of these ordinances, the 21th sec. of the 17 Geo. III, ch. II, and the 37th of the 25 Geo. III, ch. II, enact "that if the Defendant shall convey "away or secrete his effects, or shall, with violence, or by shutting up his "house, store or shop, oppose his effects being seized, *an execution shall go* "*against his person.*" And the 22nd sec. of the 17 Geo. III, ch. II, and the 38th sec. of the 25 Geo. III, ch. II, enact, that "an execution against the "person of the Defendant, shall issue for the satisfaction of all judgments "given in commercial matters between merchants or traders, as well as of all "debts due to merchants or traders for goods, wares and merchandise by "them sold," and upon these sections, it is only necessary to observe that they restore the ancient law, and plainly extend instead of abrogating or restricting the provisions of the Code Civil.

On these grounds we hold the 4th article of the 34th title of the Code Civil to be yet in force, and, therefore, because the *contrainte par corps* is thereby allowed upon foreign bills of exchange, and because also all such bills are by law considered to be commercial matters between merchants or traders, as well as of all debts due to merchants or traders for goods, wares and merchandise by them sold, and upon these sections, it is only necessary to observe that they restore the ancient law, and plainly extend instead of abrogating or restricting the provisions of the Code Civil. On these grounds we hold the 4th article of the 34th title of the Code Civil to be yet in force, and, therefore, because the *contrainte par corps* is thereby allowed upon foreign bills of exchange, and because also all such bills are by law considered to be commercial matters between merchants or traders, 2 Pothier, *Contrat de change*, n° 27, p. 107, and the parties to such bills in the light of merchants or traders, (which brings the case within the very words of the 38th section of the ordinance, 25 Geo. III, ch. II), we are of opinion that a return of *nulla bona*, which the ordinances require, having been made to us, and no cause being shewn against the present motion, the Plaintiff is entitled to a *capias ad satisfaciendum*.—Rule absolute.

(1) Code Civil, tit. XXXIV, art. 4 ; 5 L. C. Den., *v° contrainte par corps*, 447.

(2) V. art. 49 et 116 C. P. C.

PER CURIAM: Misnomer is not the subject of an exception as to form: it must be pleaded by a temporary exception, as it is in England, by a plea in abatement. An exception as to form is merely a preliminary plea, and corresponds to the special demurrer of Westminster Hall. It has reference, not to the parties or to the subject matter of the action, but to imperfections, defects and want of legal form in the writ or return, in the libel, or in the conclusions of the declaration. An exception as to form is of the class of *fins de non procéder*, and consequently, impeaches, directly or indirectly, the jurisdiction of the court. *Ils n'attaquent que les juridictions*, (1) and its object is to show that some steps which the law requires *à peine de nullité* in all causes and between parties of all and any description, has not been observed in the particular case before the court: so that not being legally possessed of the suit, the court cannot proceed in it, "or enquire into any question relating either to the parties or to the matter in dispute." A plea of misnomer, on the contrary, has reference not to the court but to the parties, puts the right of action in issue, not indeed with respect to the subject matter of the suit, but in relation to the parties. Its object is to show that, in the particular case before the court, the Plaintiff cannot have any right of action against the Defendant, because the latter, though regularly summoned and formally complained of, is not the person named in the declaration, and, consequently, is not the person who, by the Plaintiff's own shewing, is his debtor; and, therefore, he avers that the Plaintiff cannot, *at this time*, have or maintain his action against him, the Defendant, for or by reason of the matters or things in the said declaration set forth: thus admitting according to the fact, if there be no exception as to form on other grounds, that he has been formally and regularly brought into court, and consequently admitting that the court, notwithstanding the misnomer, is legally possessed of the suit. For these reasons, the exception as to form which has been fyled in this cause must be dismissed. Exception dismissed. *(Stuart's Rep.*, p. 56.*)*

(1) Serpillon, 54.

DELAY.—SHERIFF'S RETURN.

COURT OF KING'S BENCH, Quebec, 9th October, 1811.

DORVAL *vs.* L'ESPÉRANCE.

Held: That, if an application be made to compel the sheriff to return a writ of *fieri facias* before the day fixed for the return in the body of the writ, the court will not grant the application, if there be no evidence to show that the sheriff has actually been guilty of some neglect or omission. (1)

A writ of *fieri facias* had been issued returnable on the 1st day of February, 1812. The sheriff having levied the amount, and no opposition *à fin de conserver* having been fyled on behalf of any of the creditors of the Defendant, *Vanfelson* obtained a rule on the sheriff to return the writ, *nisi causa* this day. (2)

PLAMONDON, contra, contended that the sheriff could not be compelled to make any return before the return day. That he might, if he chose so to do, pay over the money as soon after it was levied as he thought fit, but that it was at his own proper risk, and that in England it was held that the money ought to be brought into court. (3) The sheriff is aware that no oppositions *à fin de conserver* have been filed, but he cannot say whether the Defendant is solvent or insolvent, nor how many oppositions may be filed before the 1st day of February.

PER CURIAM: The question for our determination is, whether the sheriff can regularly be called upon, by rule, to return a writ of *fieri facias* before the day fixed for the return in the body of the writ: for although the object of the Plaintiff is to compel the sheriff to pay over to him the amount of his debt and costs which the sheriff (as he alleges in argument) has realized by the sale of the Defendant's moveable property, the motion is for a rule to return the writ and no more, and the only answer to the motion is that the writ is returnable on the first day of next term.

By the 20th art. of the 33rd title of the Code Civil, the *huissier* was directed to pay over to the Plaintiff the amount which he levied on the moveables of a Defendant as soon as they were sold; but it must be remembered that the courts, when this country was subject to the government of France, did not sit in terms; and that the *huissier* had no writ of

(1) V. art. 545, 633 et 697 C. P. C.

(2) 6 Bacon's Abrid. Sheriff, *letter* N, 178; 5 Burn's Jus., *verbo* sheriff, and 3 Salk., 323.

(3) Viner, sheriff, *let.* A., 434; 2 Tidd's pr., 928.

execution commanding him to bring the money into court on a specific day, but proceeded entirely on a copy of the judgment authenticated by the seal of the court. The direction of the Code Civil is, consequently, no longer applicable, and we must necessarily take our rule from the experience and practice of the courts of Westminster Hall, from whence the Legislature has adopted the system of courts sitting in terms, and the principle that judgments must be executed by the authority of the King's writ. The parties have so considered the question and referred us to English authorities, of which the most recent states, that the sheriff, on the return day of the *fieri facias*, may be called upon by rule to return the writ." (1) And this is strictly consistent with the decision in the case of *the King* vs. *the Sheriff of Cornwall*, (2) in which a rule calling on the sheriff to return a writ was declared to be irregular, and set aside, because it had been taken out as a side bar rule in the preceding vacation. On this occasion the court observed "that a rule calling on a sheriff, to return a writ presupposes some neglect on his part, and consequently should not issue, until he has *actually* been guilty of some omission; and in this case we have no evidence of any neglect or omission, or of any act whatever contrary to the command of the writ. The sheriff, if there be no impediment by oppositions, may pay and may return that he has paid the money levied on a *fieri facias* to the Plaintiff,(3) although in strictness the money ought to be brought into court as the writ requires. But this must be done at his risk, and if he does not do so, we cannot rule him on this account to return the writ before the return day. (*Stuart's Rep.*, p. 57.)

HOLOGRAPH WILL. - NOTARY.

COURT OF KING'S BENCH, Quebec, 19th October, 1811.

EX parte FREDERICK GRANT and JOHN GREENSHIELDS, on a petition against JOSEPH PLANTÉ, a notary.

Held: That, if a paper writing contained in a sealed envelope, purporting to contain an holograph will, be opened by a notary public and retained by him after the decease of the testator; such notary cannot keep it on record in his office, but must produce the same before a judge, that probate may be made, and the will is then to remain deposited with the records of the Court of King's Bench. A notary public has no authority to unseal an holograph will, unless in the presence and by the

(1) 2 Tidd's pr., 928.

(2) 1 T. R., 552.

(3) 2 Show Rep., 87, *Rex* vs. *Bird*, 2 Lev., 204; 4 Bacon's Abr., fo. 460.

order of a judge. An holograph will of personal and moveable property is valid, by the law of England, and probate may be made thereof according to the Prov. Stat., 41 Geo. III, ch. IV. (1)

John Patterson, a merchant of Quebec, and copartner in trade with Messrs. Grant & Greenshields, the Petitioners in th s case, died in September, 1811, leaving property to a large amount; upon examining his papers, after his decease, his surviving copartners found a sealed packet, upon which in his hand writing, was the following endorsement: " Mr. *John* " *Patterson's* private papers to be opened only in the event of " his decease, Quebec, 14th November, 1809," and conceiving it to be his will, and not choosing to open it without witnesses, they sent for a notary, *Joseph Planté*, and two other persons, and, in their presence, at the request of the Petitioners, the packet was opened by the notary. It was found to contain an holograph will, dated, signed and entirely written by the deceased, with articles of the several copartnerships in which he had been concerned. The will consisted of several bequests of sums of money to divers persons, without any devise or testamentary disposition of any description as to immoveable property of any kind. The notary, after perusal of the will, caused it to be " paraphed," *ne varietur*, by all the persons who were present, and, having drawn up a regular *procès-verbal* of the proceedings, in which it was declared that, at their request, the will was placed " en dépôt, au rang de ses minutes, pour leur en être délivré et à qui il appartiendra, toutes expéditions nécessaires." He took the will into his possession and custody. The object of the petition was to compel the notary to deliver up the will, and to fyle it in the office of the prothonotary of the Court of King's Bench, in order to obtain an efficient probate of the will for the immediate purpose of recovering the outstanding debts due to the late copartnership of *Patterson, Grant & Co.*

For the Petitioners it was urged that what was now asked had been largely considered in the application made by the heirs of *Duchesnay*, in this court, for the same purpose as the present (2). The court had, in that case, determined, that an holograph will which the heirs of the testator had permitted a notary to take possession of and to place among the minutes

(1) Le sec. 2. du ch. IV des Statuts du Bas-Canada de 1801, 41 Geo. III, est en ces termes :

II. Et comme il s'est élevé des doutes sur la manière actuelle de prouver les testaments faits et dressés suivant la forme anglaise, devant un ou plusieurs des juges des cours de juridiction civile en cette province, qu'il soit de plus statué, que telle preuve vaudra et aura force de la même manière que si elle était faite devant une cour de *Probate*. V. art. 857, C. C.

(2) Determined in K. B., June term, 1807.

of his notariat, after the testator's death, could not remain there, and the notary was ordered to deposit the original in the hands of the officer of this court. The principal object, in the case of Duchesnay, and in this case, was to obtain a legal probate of the will, and in the case of an holograph will, not placed *en dépôt*, in the office of a notary, by the testator personally, during his life, an efficient probate could only be obtained in this court. The will, as it stood, was totally unauthenticated : it was not the notary who had found it among the papers of the testator. The copartners of the testator had, indeed, delivered it to him, declaring they had so found it, but not upon oath, nor was there, at present, any evidence whatever that the will or the signature to it were of the handwriting of the testator. Messrs. *Grant*, *Greenshields*, *More* and *Robert Patterson*, had all declared that they were of the testator's handwriting, but again, not upon oath. The certificate of *Planté* would prove, thefore, that the will was said to have been found, among the papers of the late Mr. *Patterson*, and was said to be of his handwriting; but it could prove no more, and the will being totally unauthenticated, it must remain in that condition until it should be proved before one or more of the judges of this court, and deposited in the office of the prothonotary, under the 2d section of the Prov. Stat., 41st Geo. III, ch. IV ; when a certified copy will have the same effect as if it had been proved in a Court of Probate, and will be received in England, but not otherwise.

On the part of Planté, it was contended that it mattered not by whom the will had been placed *en dépôt* in the hands of *Planté*; that, being once possessed of it, *à titre de dépôt*, he was authorized by law to retain it, and that it could not, therefore, legally be taken from his notariat (1). As to the probate, its must be made in the way that all other acts " sous seing privé," when placed in a notary's minutes, are to be proved, by *expert* and by *comparaison d'écritures*, when contested and not before. The persons interested in the will, in this case, Messrs. *Grant* and *Greenshields*, have acknowledged it to be of the handwriting of the testator. If his heirs are absent, a curator may be appointed, and, if he sees fit to impugn the will, he will do so, and it will then be time enough to prove it. It was insisted, therefore, that if the will should be brought into court, it must, after probate, be returned to the notary, as he could not, consistently with the law of the country, be deprived of any writing which had been

(1) 2 Parf., not. 180 ; 4 Grand Commen., 89 ; Deniz., *verbo* scellé, 12 ; Rép. de Jur., 203.

deposited in his custody. What he so receives is a matter of record and a record, once made, cannot be changed. As to the argument that a will without probate in a court of law would be of no avail in England, it was unfounded. Every act is considered according to the law of the country in which it is done. By that the form in which it is executed is directed, and by that form the validity or insufficiency of every act must every where be decided, there can be no other criterion.

In reply was urged the absolute necessity of the previous probate in all cases where such can be had, for the protection of executors in their duty, and of debtors in their payments to executors, and to prevent any unnecessay anthenticity of an holograph will, which, according to the argument on the other side, might be raised in every case. That there could be no such thing as a probate before a notary, because a notary has no power to administer an oath, and that it seemed, therefore, to be unquestionable that all probates should be made in this court, because, then, they are efficient. That, in the case of Duchesnay, it was admitted that a sealed will could not be opened without the presence of a judge, yet, that, in this case, although the will was opened without the presence of any judge, its was contended that all the proceedings were regular, so regular that *Planté's* right to the custody of the will is placed beyond all doubt. This, therefore, should have been distinctly shown by authorities, particularly as the decision of this court upon the very point was directly against it, the judges having decided that the opening of Duchesnay's will, without the presence of a judge, was an act contrary to law and to the duty of the notary.

SEWELL, CH. J: The paper writing mentioned in the *acte de dépôt*, which has been fyled, is presumed to be the will of John Patterson, but it is not yet proved to be such. It however purports to be his will. It remained, as it appears, in his possession until the hour of his death. It was found sealed up among his papers, after his decease, and by the notary Planté, was opened, without the authority of a judge, and Planté insisted upon his right to retain it, under these circumstances. This is the case.

Now, it is certain, that, being sealed, the notary had no authority to open the packet which contained it, but in the presence and by the order of a judge. This was the Roman law unquestionably; and, although there does not appear to have been any positive law in France, upon the subject, yet, such was the practice in that kingdom, and particularly in the *Châtelet de Paris*, (1) in all instances of holograph wills, and

(1) Actes de notoriété du Chât. de Par. of 20th March, 1708; 2 Barde, 179, col. 1; 4 Henrys, 456, 457, nos 40, 41; 2 Pig., 283.

according to *Jousse*, of "testamens solennels" executed before notaries, (1) all persons interested in the will, being competent to apply for its being so opened. (2) The opening of the sealed packet containing the holograph will, in this case, was consequently an illegal act on the part of the notary, and, as no legal right can flow from any illegal act, or assumed authority, it follows, that the notary's pretension to retain the will is unfounded, and the case of Duchesnay's will, which has been cited in this respect, is expressly in point. There has, in fact, been no *dépôt* of the paper in question, because there was no authority in any of the parties concerned in the opening of the will, to make any disposition of it. It was a judge, and a judge only, who could order it to be deposited in any other place than that in which it was found, and it was his duty to point out the officer in whose custody it should be placed. (3) For, admitting that, under the law as it formerly stood, it was necessarily a notary, and only a notary, in whose custody it could be placed, it was nevertheless the judge who was to name him; and he was authorized to appoint such notary as he might see fit to select for the purpose, this was the constant practice of the *Châtelet*. "Il (M. le Lieutenant civil) rend une ordonnance, portant que la minute du testament, s'il est olographe, sera déposée à un notaire *qu'il nomme*, et qui s'en charge en conséquence." The matter is, therefore, before us as if the will had now been opened in court, and it remains for us, exercising a sound and legal discretion, to determine how the probate of this will shall be made, and in whose custody it shall be placed. The Quebec Act, 14 Geo. III, ch. LXXXIII, introduced into Canada the form of wills, prescribed by the law of England, (4) and, from that period, all wills which have not been executed before notaries, have been proved in the courts of civil jurisdiction, in the several districts, before one of the judges, and have then been deposited of record. The Prov. Stat, 41 Geo.

(1) I Traité de l'administration de la Justice, 211, n° 99.

(2) 4 Henrys, 457, n. 41.

(3) Actes de notor., 337, 338 and 339. note (*a*)

(4) La sec. 10 du ch. LXXXIII des Statuts impériaux de 1774, 14 Geo. III, intitulé: "Acte qui règle plus solidement le gouvernement de la province de Québec, "dans l'Amérique Septentrionale." est en ces termes: "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans la dite province, qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts, pendant la vie, par ventes, donations, ou autrement, de les tester et ligner à sa mort, par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en la dite province; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre."

III, ch. IV, s. 2, declares that doubts had arisen touching this method of proving last wills and testaments, made and executed according to the forms prescribed by the laws of England, before one or more of the judges of the courts of civil jurisdiction, in this province, and it, therefore, enacts that such proof shall have the same force and effect, as if made and taken before a Court of Probate. Here, the will is merely a will of personal and moveable property, and, consequently, in its form, is a valid will, according to the forms prescribed by the law of England. (1) The probate, therefore, of this will, in this court, will be strictly proper and valid, under the statute; and, as it clearly appears to us, that a probate so made will be more beneficial to the parties who are interested in the will than any other course which we can direct, and, to say the least, is equally legal, we cannot do otherwise than order that the will be proved in this court, where, of course, after probate, it must necessarily be deposited, not only, because in all Courts of Probate this is done, but, because this is the "method" which, in similar cases, has hitherto been followed in this province, and is recognized by the Provincial Statute, 41 Geo. III, ch. IV.

The court accordingly makes the following order:—that *Joseph Planté*, notary, do exhibit and deliver, in the office of the prothonotary of this court, on Thursday next, at the hour of ten, in the morning, unto one or more of the judges of this court, the will and testament holograph of *John Patterson*, late of the city of Quebec, merchant, deceased, dated the 13th Nov., 1809, and mentioned and described in the act intituled "*Dépôt du Testament olographe de feu M. John Patterson*," in this cause fyled by the said *Joseph Planté*, and therein mentioned to have been received from Frederick Grant and John Greenshields, merchants, and late copartners in trade with the said John Patterson, on the 17th day of Sept. now last past, in a certain envelope of paper sealed: and, it is, further, ordered that probate of the said will and testament holograph of the said John Patterson be then and there made, before one or more of the justices of this court, in due course of law, and that, such probate being so made, the said will and testament holograph of the said John Patterson do, therefore, remain deposited of record, in the office of the prothonotary of this court, to and for all legal interests and purposes whatsoever. (2) *Stuart's Rep.*, p. 60.)

(1) 4 Ves., 200.

(2) See the ordon. of M. le Lieutenant civil, in the Châtelet of Paris of 13th Feb., 1668, against Faudoire, a notary, enforced by an attachment against the body on the 21st of the same month. Actes de notor, note (*a*) col. 2, p. 338. The will, in obedience to this order, was proved and deposited, as it directs.

PUBLIC OFFICER.—RESPONSIBILITY.

COURT OF KING'S BENCH, Quebec, 20th October, 1811.

WILLIAM FISHER SCOTT, against WILLIAM LINDSAY.

Held: That where a person contracts as a public officer, he is not personally responsible, without some peculiar cause to charge him. (1)

It appeared on the trial of this case, that the Defendant, being clerk of the Assembly, had employed the Plaintiff as a writer during a session of the Provincial Parliament in copying the journals. No special agreement had been entered into by the parties.

PER CURIAM: An individual in a public office certainly may, by his contracts for public services, render himself personally liable, but where he has plainly acted as a public officer, he cannot be personally liable unless there is some peculiar cause to charge him. In this case it is in evidence, that the Plaintiff knew that the Defendant contracted with him as an officer of government, and that he looked to government for his reward. The account which he delivered to the Defendant is headed "Government to William F. Scott, Dr.", and this of itself is a distinct admission on his part as to the character of his agreement, that it was not personal but official. The Defendant, therefore, cannot be personally answerable for the sum which the Plaintiff may have earned. As to the principle on which this decision is founded, the law of England and the law of Canada, are in perfect unison. (2)

Action dismissed. (*Stuart's Rep.*, p. 68.)

BILL OF EXCHANGE.—DAMAGES.

COURT OF KING'S BENCH, Quebec, 20th April, 1812.

ASTOR *vs.* BENN, BUCHANAN and HEATH.

Held: That the drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is drawn, and to no other.

The Defendants drew, at Quebec, a bill of exchange, on Buchanan and Benn, of Liverpool, in England, in favor of Proctor & Froste, of Montreal. By Proctor & Froste, this bill was

(1) V. art. 1715 C. C.

(2) Vide the cases referred to in 1 Comyn, *on contracts*, p. 272; (Œuv. de Cochin, vol. V, p. 760.

indorsed, in Montreal, to the Plaintiff, a merchant of New York, and, by him, indorsed, at New York, to Strong & Dewis, merchants of that city. The bill was afterwards protested, for non-acceptance and non-payment, and returned to Strong & Dewis, who, thereupon, demanded and received, from the Plaintiff, the principal and interest of the bill, with twenty per cent damages, according to the law of the State of New York, in ordinary cases of protested bills: and the question in this action was, whether the Defendants were responsible to the Plaintiff, for any more than the amount of the bill, in principal and interest, with ten per cent damages, according to the Provincial Ordinance, 17 Geo. III, ch. III, § 1. (1)

SEWELL, CH. J: The contract between the original parties to a bill of exchange, is to be construed by the law of the country in which it is drawn, (2);—whatever is there determined to the prejudice of the drawer he must abide by, and, by the same rule, he is entitled to all that is thereby allowed to his benefit. The payee and every subsequent indorser knows, from the face of the bill, where it was drawn, and each is bound to know the law of the original contract, since every man, at his peril, must take cognizance of the law of the country with which he corresponds, and has dealings, otherwise, there would be an end of trade. (3) When a bill of exchange is negotiated, through a foreign country, out of the direct course, it is an act in which the drawer does not participate, if there be no special agreement. (4) And if it be in-

(1) La sec. 1 du ch. III des ordonnances du Gouverneur et du Conseil législatif de la province de Québec de 1777, 17 Geo. III, intitulé : "Ordonnance qui "fixe les dommages sur les lettres de change protestées, et le prix des intérêts "dans la province de Québec," est en ces termes : "Toutes lettres de change tirées par des particuliers demeurans en cette province, sur d'autres particuliers en Europe, ou dans les Indes Occidentales qui, après la publication de cette ordonnance, reviendront protestées, ainsi que celles tirées à l'avenir par des particuliers demeurans ici sur d'autres en Europe, ou dans les Indes Occidentales qui reviendront protestées, seront sujettes à dix pour cent de dommages, et six pour cent d'intérêt par an, sur la somme totale qui aura été comptée ici, du jour de la date du protêt, jusqu'au jour du paiement ; laquelle dite somme sera remboursée au porteur de la lettre avec le change, sur le pied de cent onze livres un neuvième courant de cette province, pour chaque cent livres sterling." Voir la sec. 57 du ch. XXXIII du statut du Canada de 1890, 53 Vict., *l'acte des lettres de change*, 1890.

(2) Chitty, *on bills*, 78.—1 B. and P., 141 ; 3 Ves. jr., 447 ; 2 H. B., 603 ; Cowp., 174 ; Burr., 1077 ; 1 H. B., 126 ; 7 T. R., 242 ; 1 T. R., 10 ; 5 East, 130 ; Ambler, 672-676 ; 2 Bornier, 629, note on art. 56.

(3) Ambler, 675.

(4) Jurisp. Consul, 397, n° 7 ; Glen, *on bills of exchange*, 239-241.
Ferguson vs. *McDonald*, K. B. Q. This case was decided in February, 1803, *coram* ELMSLEY, CH. J., and damages at twenty per cent were allowed, because it had been expressly agreed between the drawer and the payee that the bill should be negotiated through New York. *Vide* Poth., *Change*, n° 67.

dorsed in such foreign country, as every indorser is considered in law a new drawer, it becomes, in fact, a new bill, and by the indorsement a new contract is formed between the indorser and his payee, which is also to be construed by the *lex loci*, by the law of the country in which it is so indorsed.(1) It is certain, moreover, that where the law of a foreign country so clashes with the rights of the subjects of our own, that one or the other must necessarily give way, our own is entitled to the preference, "this," says Lord Ellenborough, "has been long settled in principle, and is laid up among our acknowledged rules of jurisprudence." (2) Upon these grounds, we are of opinion that *ten* per cent damages, in case of protest, were the terms of the original contract between the drawers and their payees, Proctor & Froste, in consequence of the ordinance, 17 Geo. III, ch. III, as fully as if it had been so agreed by express stipulation; that Proctor & Froste, by their indorsement, could convey to their indorsee, the Plaintiff, no more than the rights which they themselves held, according to these terms, and that the indorsement, at New York, has not varied the original contract, so as to affect the rights of any of the antecedent parties to the bill, and judgment must accordingly be entered for the amount of the bill with interest at six, and damages at ten per cent, as directed by the ordinance. (3) *(Stuart's Rep.*, p. 69.*)*

SHIP.—BUILDER'S PRIVILEGE.—MARITIME LAW.

COURT OF KING'S BENCH, Quebec, 19th June, 1813.

BALDWIN *vs.* GIBBON, and MCCALLUM, Opposant.

Held: A builder's privilege upon a ship of his own construction, is lost, if he delivers her to the owner, and suffers her, knowingly, to be sold at public auction, to a third person, without opposition. (4)

(1) 2 Burr., 674 ; 1 Str., 441. That which discharges a debt in the country where it was contracted is a discharge of it in every other place, *Ballantine* vs. *Golding*, 4 T. R., 185. n. ; *Potter* vs. *Brown*, 5 East, 130. *Ten* per cent damages was a part of the original debt. Ambler, 672-675, and the undertaking to pay that quantum of damages being the original contract, payment of the bill in question, in principal and interest, with damages at ten per cent, would seem consequently, to be a discharge of the whole debt in Canada, and every where else. Vide *Warder* vs. *Arrell*, Washington's Reports, 282, and *Powers* vs. *Lynch*, 3 Massachusetts Rep., 77, as cases wherein the American courts had admitted this principle.

(2) 5 East, 130.

(3) In an action, brought on a bill of exchange drawn by J. S. Crawford, at *Quebec*, upon, and accepted by the Defendant, in England, it was held, by Lord ELLENBOROUGH, that the acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal sum, together with interest, according to the legal rate of interest where the bill is payable. *Woolsey* vs. *Crawford*, tried at Guildhall, the 28th May, 1810; 2 Camp. N. P. C., 445.

(4) V. les art. 1994 et 2001 C. C.

The Code Marine, if it even was in force, was no part of the common law of Canada, but a part of the public law, and, consequently, superseded by the effect of the conquest; and, if it was law in the Admiralty jurisdiction alone, whether it was public or common, the introduction of the English Admiralty law abolished it.

In October, 1811, Baldwin, a ship builder, instituted the present action, by a writ of summons, and obtained judgment, against Gibbon, the Defendant, on the 14th April, 1812, for a balance of £110, due for the construction of a new ship. Pending the action, the ship, which, before the action was commenced, had been delivered by Baldwin to Gibbon, was transferred to him, by a regular bill of sale, and enregistered in his name. A writ of *fieri facias* was issued, upon the above judgment, against the property of Gibbon, and the ship being seized, as such, in the possession of McCallum, the latter, by an opposition *à fin de distraire*, laid claim to the ship. On the other hand, Baldwin insisted that she was still the property of Gibbon, and, if she was not then, that he, as builder, had a particular *lien*, or privilege *réel*, upon the ship, that she had been sold subject to his *lien*, and by him, therefore, upon the principle of the *droit de suite*, might be seized and sold, for the payment of his privileged debt.

SEWELL, CH. J: The sale of the ship, by Gibbon to McCallum, was before judgment, and, after the delivery of the ship, by Baldwin to Gibbon, and was publicly made. The transfer, in point of form, is correct, and the ship has been duly enregistered, as the property of McCallum. None of these proceedings are impeached, on the score of fraud, or on any other ground: the whole of them had taken place, with the knowledge of Baldwin, and, without any opposition, or interference on his part, and there is no allegation that Gibbon is in a state of *déconfiture* (bankruptcy.) There is no pretence for saying that the ship is the property of Gibbon. The only question, therefore, for our enquiry, is whether Baldwin is entitled to his particular *lien* or privilege (1), upon the ship, under the circumstances of this case; for, although a ship builder has, for a *bona fide* debt, a privilege *réel* upon his work, yet, he may forfeit and lose this privilege, by his misconduct. It has been contended that this privilege of a ship builder continues after a sale by the debtor, and until the ship has performed one voyage: and to prove this assertion, the ordinance *de la Marine* of 1681 (2) has been cited

(1) A particular or specific lien according to the law of England and Scotland, is called in the law of Canada, a "privilége réel."—*Vide* 1 Pigeau, 681. It is the right of retention enjoyed by a party to a contract, concerning moveable property, till indemnified for labor.

(2) Valin, *Ord. de la Marine*, tit. X, art. 2, liv. II, p. 602.

and relied upon, and it has been said that this ordinance was received as law in the Court of Admiralty (in Canada), before the conquest.. But, admitting this to be the fact, and that it was even enregistered in the Sovereign Council of Quebec, it is clear that it formed no part of the common law of Canada, and that it must have been received in the Admiralty as a part of the public law, (1) in which case it was superseded, as well, by the tacit effect of the conquest, (2) as by the introduction of the law of the Admiralty jurisdiction of England, by the King's commission of vice-admiral to the governor (Murray), in 1764, and the subsequent establishment of the Court of Vice-Admiralty. (3) These points have been discussed and decided in this court, (4) and it follows that the provisions of the ordinance *de la Marine* by which a ship, notwithstanding a transfer, by sale, continues bound and liable for the payment of all debts with which she was previously charged, until a voyage has been completed, (5) have no bearing upon the question before us, and that Baldwin's claim to a *privilége réel* upon the ship is no more than the claim of any other creditor, entitled to a particular *lien*, upon moveable property, ships being moveables, (6) and, as it is certain that creditors of this description lose their privilege when they relinquish the possession of the moveable upon which it is charged. (7) (*Stuart's Rep.*, p. 72.)

(1) Ferrière, D. D., *verbo* Amirauté.

(2) 3 Cochin, 435 ; Vattel, liv. III, ch. XIII, sec. 198 ; Dunod, *Prescription*, ch. v, Jour. des Aud., p. 12, vol. V ; 2 L. C. Den., *verbo Artois*, p. 348 ; 5 D'Aguesseau, 392-400 ; Marriot's *Rep.*, p. 28 ; 5 East's *Rep.*, p. 131 ; Salkeld, 411. See also Lord Stowell's judgment, in *Ruding* vs. *Smith*, reported in the Annual Register of 1821, vol. LXIII, p. 400.

(3) Mazeres' Coll. of Quebec papers, p. 19.

(4) In the case of *Wompré* vs. *Lyon*, K. B. Q., 1806 ; and that of *Fraser* vs. *Hamilton*, *ante*, p. 34.

(5) Tit. X, lib. II, art. 2, p. 603. On this article, and as to when a voyage was performed, see *Pandectes françaises*, vol. XIX, p. 395.

(6) 1 Valin, liv. II, tit. X, art. 1, p. 601 ; Brodeau, sur art. 90 of Cust. of Paris, n° 4 ; Ferrière, *on art.* 90, n° 14 ; Duplessis, *Tr. des meubles*, p. 135 ; 19 *Pand. franç.*, 381.

(7) 2 Den., p. 300, n° 4 ; 2 Ferr , D. D., *verbo privilége*, 427 ; 2 Bourjon, 679, n° 18, and 691, n° 88 ; Ambler, 252 ; 1 Burr., 494 ; 1 East, 5.-1 ; Atk., 234 ; Doug., 101.

In the case of *Wells* vs. *Osman*, 2 Lord Raymond's *Rep.*, 1044, it was said, *per Curiam*, when the builder trusts the contractor, so far as to let the seamen go on board, there is no reason to help him.

Note.--To justify the retention of moveable property, the following points must be established in evidence : 1° Actual possession, constructive possession is not sufficient ; -- Bell's Comm., 476 ; 2 Den., *verbo* facteur, p. 300 ; 3 T. R., 119, 783 ; 1 East, 5.--2° That the possession enjoyed is legitimate, 3 T. R., 406, 417 ; 3 Bro. Ch. Cases, 571 ; Bell's Comm., 476. It is therefore held that the possession of goods obtained by an informal attachment cannot be retained, Bell's Comm., 477.

SHERIFF.—ATTACHMENT.—RESPONSIBILITY.

COURT OF KING'S BENCH, Quebec, 20th October, 1813.

McCLURE, against SHEPHERD.

Held: That the sheriff having seized, by attachment, a large quantity of timber, and appointed a single guardian, to take charge of the whole, in whose absence, during a sudden storm, a proportion of the timber, not being moored, or otherwise secured, went adrift, and was lost;—held that the sheriff was guilty of ordinary neglect and responsible for the loss.

Also, that the sheriff might have employed as many persons as were necessary for the security of the timber, and have demanded of the Plaintiff, at whose suit the timber was seized, in advance, the sums required for this purpose; and, in case of refusal, would have been exonerated from the charge and custody of the timber. (1)

This was an action to recover a certain quantity of timber belonging to the Plaintiff, which had been seized by the Defendant, as sheriff of the district, in virtue of a writ of *arrêt simple* issued, at the suit of one Mary Barrows. The Plaintiff declared that, after the return of the said writ, *main-levée* had been granted of the seizure, and the Defendant ordered to deliver the timber to him, which he had refused to do.

The Defendant pleaded first, the general issue. Secondly, that, on the eighteenth day of July, 1810, the said timber

(1) The earliest case relating to the liability of sheriffs, in civil matters in Lower Canada, whereof any trace is to be met with, is that of *McAuley* vs. *Shepherd*, argued and decided upon an appeal from this province, before His Majesty in his Privy Council, in the year 1787. The case was argued, on the part of the sheriff, Appelant, by the late master of the rolls, Sir *William Grant*, and the following is an abstract of the grounds of the judgment in the Privy Council, as contained in a letter from him to his client, the sheriff, announcing the reversal of the judgment of the Court of Appeals here, and the dismissal of the action against him :—" The lords, at the board of Privy Council, adopted, as the grounds of reversal, very nearly the same reasons as are stated in our case. Lord *Camden* said, that it was of great consequence that men should know, with precision, under what law they are acting. The laws of Canada being, by the Quebec Act, made the rule of decision in all civil cases, no part of the law of England would operate there, except in so far as it may be clearly and expressly introduced by an ordinance of the province. To say that the bare mention of the word sheriff, in an ordinance, should have the effect of introducing the whole body of English law relative to that office was absurd.—That officer existed before the ordinance passed, and had a duty to execute under the criminal law of England. If the ordinance had been silent, he would have had nothing to do with civil process, under the law of Canada. It is the ordinance that gives him the execution of civil process, and further than it charges him, he cannot be liable. If it was intended to adopt the law of England with regard to escapes, it ought to have been done in clear and unambiguous language ; — that the officer might have known whether he would accept of the office under such conditions.—Sir *Lloyd Kenyon* acceded to this, and, in addition, laid some stress on your not having the appointment of the gaoler. The rule *respondeat superior* supposes the gaoler to be the sheriff's servant, which he was not in this instance.

was, by the irresistible force and violence of the winds and waters, carried away; and, save and except a certain portion thereof in the said plea specified, was altogether lost and destroyed, without any fault or negligence on the part of the said Defendant. That the said Defendant thenceforward to the time of fyling the said plea had used great diligence, and incurred great and heavy expenses, in recovering and saving as much of the said timber as was possible; and had recovered and saved for the Plaintiff a part thereof, to wit, &c., that the monies by him laid out and expended, in and about the salvage of the said timber amounted to a large sum, to wit, to the sum of £300. That the said Defendant had a special *lien* and privilege on the said timber, and had a right to hold and detain the same, until, as well the said sum, as his lawful fees, were paid to him. The third plea was the same as the second, omitting all that is therein stated respecting the salvage. It appeared in evidence that, upon the seizure made by the Defendant, he appointed a single guardian to take care of the whole, and, in the absence of the guardian, a proportion of the timber, not being moored or otherwise secured, went adrift, during a sudden storm, and was lost, and that the timber was afterwards, by judgment, declared to be the property of the Plaintiff McClure.

SEWELL, CH. J.: It is generally true that every bailee of property is responsible for a loss by accident or force, if it be occasioned by a degree of negligence for which, by the nature of his contract, he is answerable: (1) and, as a general principle, it may be said that every public officer is answerable for the acts of his own ministers and servants. (2) By the common law of Canada, the *huissier* was merely the seizing officer. It was the guardian, who was appointed by the *huissier*, who had charge of the property seized, and the *huissier* was not responsible, if he named for guardian a person solvent in general repute. (3) The law, in this respect, is now materially changed, all writs are addressed to the sheriff, and it is enacted by the ordinance, 27 Geo. III, ch. IV, § 11, "That, if "upon an attachment, security is not given, the goods shall "remain attached and held by the sheriff," so that, the sheriff is now the detaining, as well as the seizing officer, the guardian as well as the *huissier*. Now, the guardian was answerable for ordinary neglect or *faute légère* (4), and conse-

(1) Jones, *on Bailments*, 122.

(2) Coquille, *Quest.* 215; Poth., *Dépôt*, n° 111, vol. II, p. 839; 2 T. R., 148.

(3) 2 Poth., *Dépôt*, 830, n°s 91-92-93; 1 Pigeau, 624; Jousse, *C. C.*, vol. I, p. 406; Serpillon, 624.

(4) 2 Poth., *Dépôt*, n°s 91-96; Den. L. C., *Gardien*, § 4, n° 2, vol. IX, p. 239; Serpillon, 632; Rép. de Jur., 8vo, vol. XXIV, p. 404, *verbo* faute.

quently the sheriff, if he is now the guardian, must be answerable to the same extent; for there is at least the same reason for his responsibility, perhaps more, since the plaintiff has not now the choice of his *huissier* or guardian, as he formerly had. (1) It has been argued that the sheriff cannot be deemed a guardian, and that he is a *séquestre*, but this does not vary the case, both are equally answerable for ordinary neglect. (2) *Pothier* considers the contract in either case rather as a contract " de *louage*," as it is not a gratuitous contract. (3) Then, in point of fact, the neglect of the sheriff's officer, and of the sheriff in this case, amounted, at least, to ordinary neglect; (4) and it was the less excusable, because the rights of a guardian being vested in the sheriff, he might have employed as many persons as were necessary for the security of the property, (5) and he might have demanded of the Plaintiff an advance of the sums required for this purpose, and, in case of refusal, would have been exonerated from the charge and custody of the timber. (6) Upon these grounds, judgment must be entered for the Plaintiff, the Defendant ordered, on a day certain, to deliver to the Plaintiff the timber remaining in his possession, and the value of the deficiency estimated by *experts* to be hereafter named according to the usual practice of the court. (7) Judgment for the Plaintiff. (8) *(Stuart's Rep.*, p. 75.*)*

(1) 24 Rép. de Jur., 8vo, p. 381; Poth., *Dépôt*, 116 and 111; 8 L. C. Den., p. 418.

(2) Poth., *Dépôt*, 90-98-171. See also Erskine's *Institut.*, 405; 1 McDouall Ins., p. 377.

(3) Poth., *Dépôt*, nos 90-91-98.

(4) Jones, *on Bailments*, 22; 8 L. C. Den., 442; 24 Rép. de Jur., 8vo, p. 400.

(5) 9 L. C. Den., p. 234, *Gardien*, n° 4.

(6) 2 Jousse, 297, *C. C.*, tit. XXXIII, art. 10, note 2; L. C. Den., *Gardien*, § 4, n° 4; 1 Pig., 640, n° 7.

(7) See Poth., IV, 486; L. C. Den., *expert*, § 2, art. 5; 2 Jousse, *C. C.*, 296.

(8) Two appeals were instituted from this judgment,--first, to the provincial Court of Appeals, and secondly, to His Majesty in his Privy Council, and, on each appeal, the judgment was affirmed.

It should be observed that, since the decision of this case, a temporary statute, 9 Geo. IV, ch. VI, § 9, has enacted, " That in the service and execu-
" tion of writs of summons, of execution and other civil process, the custody
" and safe keeping of goods and chattels under seizure, and the receipt, safe
" keeping, and payment of all monies by them levied under any writ or writs
" of execution, the several sheriffs and coroners in this province, shall be
" liable, to the same extent, and in the same case, as any *huissier*, *gardien* or
" *receveur de consignations* would have been liable, under the laws of Canada
" previous to the year of Our Lord 1759. Provided always that, where any
" Defendant or Defendants shall offer a good and sufficient guardian or guar-
" dians to the sheriff or coroner seizing the goods and chattels of such Defen-

PROTESTANT CONGREGATION.—PARISH REGISTER.

COURT OF KING'S BENCH, Quebec, 6th October, 1816.
Ex parte the Reverend GEORGE SPRATT.

Held: That a dissenting minister of a protestant congregation, not being a public officer, *nor a person in public holy orders* recognized to be such by law, is not entitled to, and cannot keep a parish register for baptisms, burials and marriages. (1)

George Spratt, had presented a petition praying that, in obedience to the Provincial Statute, 35 Geo. III, ch. IV, the court would order and direct, two registers for the entry of marriages, baptisms, and sepultures, to be *paraphed* and delivered to him, as a dissenting minister from the Church of England, of the sect called Congregationalists, doing the clerical duty of a congregation of the same sect, at Quebec. In support of this petition, sundry papers and affidavits were fyled, in which it was stated: 1° that the Petitioner had, at Gosport, in England, by divers lay characters, been ordained " to the office of a christian "minister," in the form, used by the Congregationalists, for the ordination of their ministers; 2° that, as a minister, so ordained, he was now performing the clerical duty of a congregation of the before mentioned dissenters at Quebec. For the Petitioner, it was contended, that the petition could not fail, for want of proof of the facts on which it was founded, that it was the proper weight of those facts, and that only, which was in question. When the act of the 35 Geo. III, was passed, there were no parishes, no churches, no ministers of the Church of England, established in the country. The whole of the protestant population of the province were but, in fact, so many congregations of persons,

" dant or Defendants, under any writ of *fieri facias*, *arrêt simple* or *reven-*
" *dication*, such sheriff or coroner shall be bound to accept of such guardian
" or guardians, and shall not be deemed answerable for the act of such guar-
" dian or guardians, provided he can establish that such guardian or guardians
" when accepted of by him were solvent, or reputed so to be, to the amount
" of the value of the articles over which he or they were appointed guardian
" or guardians as aforesaid."

By the 23rd section, it is enacted, " That, whereas the seizure and custody
" of rafts and timber, more particularly when afloat, is attended with consi-
" derable risk and expense, inasmuch as a number of guardians are requisite
" to ensure the safe keeping of such rafts and timber, it shall and may be
" lawful for the sheriff, before executing such seizure, under any process to
" him directed, to demand and receive, in advance, from the Plaintiff or
" Plaintiffs, his or their attorney or attornies *ad litem*, such sum as shall by
" any one of the justices of His Majesty's Court of King's Bench for the dis-
" trict, or provincial judge of the inferior district, where such process shall
" issue, be deemed sufficient, for the safe keeping of such raft or timber."

V. les art. 560, 562, 847 et 848, C. P. C.

(1) V. l'art. 5499 S. R. Q., et 39 à 78 inclus C. C., et 1236 à 1241j C. P. C.

who assembled wherever they could, for public worship: every construction of the act, therefore, which excludes other congregations of protestants, must exclude the congregation of the Church of England, for such they were and no more. Even the statute, in the tenth section, enacts a course for making valid the register of the protestant congregation of Christ Church, Montreal, which is unquestionably a church of the established religion of England. The act (1) clearly meant to include all congregations of protestants, from its general tenor, by the disjunctive *or*. A priest is throughout distinguished from a minister of lay ordination, a "priest or minister," "church or congregation," are throughout the expressions of the act; and this shews that it was intended to include protestants of all sects and denominations, priests in holy orders" and ministers in "pretended holy orders." That the case should be considered equitably, and then the state of the district of Gaspé and of the Eastern Townships would weigh in the scale: there, few of the inhabitants are members

(1) La sec. 1 du ch. IV des statuts du Bas-Canada de 1795, 35 Geo. III, intitulé: "Acte qui établit la forme des registres de baptêmes, mariages et sépultures, qui confirme et rend valable en loi le registre de la congrégation protestante de *Christ Church*, à Montréal, et autres qui ont été tenus d'une manière informe, et qui fournit les moyens de remédier aux omissions faites dans les anciens registres," est en ces termes:

"Vu que l'enregistrement uniforme et authentique des baptêmes, mariages et sépultures dans cette province tendra à assurer la paix des familles, et à constater les divers droits civils des sujets de Sa Majesté en icelle, il est par le présent statué que, depuis et après le premier de janvier qui sera dans l'année subséquente à la passation de cet acte, dans chaque église paroissiale de cette province de la communion catholique romaine, et aussi dans chaque église protestante ou congrégation en la dite province, il sera tenu par le recteur, curé, vicaire ou autre prêtre ou ministre desservant icelles, deux registres de la même teneur, chacun desquels sera réputé authentique et fera également foi en justice, sur chacun desquels les dits recteur, curé, vicaire ou autre prêtre ou ministre desservant telle paroisse ou telle église protestante ou congrégation seront tenus d'enregistrer tout de suite et sans interruption tous baptêmes, mariages et sépultures aussitôt qu'ils seront par eux faits, et seront les dits registres fournis aux dépens de la fabrique, et présentés ou envoyés avant d'y faire aucune entrée par les dits recteur, curé, vicaire ou autre prêtre ou ministre desservant chaque paroisse, église protestante ou congrégation, à l'un des juges de la Cour de Banc du Roi, ou au juge de la Cour provinciale du district dans lequel telle paroisse, église protestante ou congrégation se trouvera respectivement incluse, pour être par tel juge cotés et paraphés par chaque feuillet d'iceux, et tels registres ainsi cotés et paraphés et tenus dans la manière indiquée par le présent acte, feront foi en justice pour la preuve des baptêmes, mariages et sépultures; et celui des dits deux registres qui doit rester entre les mains des recteur, curé, vicaire ou autre prêtre ou ministre desservant telle paroisse, église protestante ou congrégation, ainsi qu'il est ci-après statué, sera un livre relié, couvert en veau ou bougran sur papier fort, lequel sera coté et paraphé comme il est ci-dessus prescrit, pour servir aux enregistrements des baptêmes, mariages et sépultures pour une ou plusieurs années jusqu'à ce que tel livre soit rempli, et l'autre registre qui devra être déposé au greffe de la cour civile du Banc du Roi comme il est ci-après statué, sera coté et paraphé pour servir pour une année seulement, à commencer le premier jour de janvier."

of the churches of England and Scotland, all or nearly all are dissenters. A construction of the statute which does not extend its benefits to dissenters, will deprive a vast majority of the protestant subjects of His Majesty, settled in this province, of all the advantages to be derived from parish registers. That the attorney general might make such use as he saw fit of the case of *Clarke Benton*, which was heard in this court in the year 1804, but that it was by no means applicable to this case.

The ATTORNEY GENERAL, in resisting the application, stated that, to enable the Petitioner to obtain a register, the place of meeting selected by his congregation should have been certified to the bishop of the diocese, and registered as the act, 1st William, ch. XVIII, directs. A certificate of his having qualified himselfs hould also be produced, under the hand of the clerk of the peace of the county, in England, where he was qualified, and he should make it appear, further, that he has taken the oaths prescribed by the statutes, 1st William, ch. XVIII, XIX, and 19th Geo. III, ch. XLIV. That he could not stand here, in a better condition than he would in England, where he would not be allowed to take the title, even of a dissenting minister, before all the requisites of the statutes which have been cited, had been strictly complied with.

In reply, it was said that the colonies were not mentioned in the statutes cited by the attorney general, and that, therefore, the Petitioner could not be bound by them.

SEWELL, CH. J.: The Petitioner, George Spratt, alleges himself to be a *protestant dissenting minister*, from the Church of England, doing the clerical duty of a congregation of dissenters, who are called " Congregationalists," in Quebec; and, upon these grounds, he avers, that he is legally entitled to have and keep a register of baptisms, marriages and burials, under the Provincial Statute, 35th Geo. III, ch. IV. The prayer of his petition, accordingly, requires us to paraphe, that is, to certify and countersign, a register for him, and for the congregation which he serves, as the act directs. The predecessor of this Petitioner, *Clarke Benton*, in the very station which the former now fills, viz.: " Minister to the Congrega- " tionalists of Quebec," advanced in this court, in the year 1804, his claim to have and keep a similar register, and, after a lengthy discussion of his pretensions, he received a solemn judgment against his claim. In the case to which I refer, *Benton* pleaded to an information filed by the then attorney general to this effect, "That, in January, 1801, by a congrega- " tion of dissenters from the mode of worship used by the " established Church of England, assembling for the worship " of God, in the parish of Notre Dame, commonly called the

" parish of Quebec, in the province of Lower Canada, he had " been regularly and unanimously chosen and appointed their " pastor, to minister unto them, in all holy things: and that " he had been, and still continued to be, the appointed, accep- " ted, and acknowledged pastor of the said congregation, and, " therefore, had legal title to keep a register." To this plea, the attorney general demurred, and judgment was entered up, and stands recorded in the following words :—" That the plea " of the said Clarke Benton, by him pleaded, is not sufficient " in law, and it is, thereupon, adjudged, that the said Clarke " Benton do not, in any manner, intermeddle with, or con- " cern himself, in the office of a priest or minister, doing the " clerical duty of a protestant church or congregation within " this province, or the rights, liberties, privileges and fran- " chises to the said office belonging and appertaining, nor any " of them; but that he be, from henceforth, wholly prejud- " ged from exercising and using the same, and every of them, " and that the said *Clarke Benton* be taken to satisfy the " King for the usurpation aforesaid."

This case is strictly in point, upon the present occasion, and the judgment upon it is a solemn decision upon the prayer of this petition. We concur in this decision, and shall now state the reasons which induce us to do so.

It must be remembered that the Provincial Statute, 35th Geo. III, ch. IV, is nothing more than a regulation *as to evidence* in the courts of law, in this province, respecting births, marriages, and sepultures; the effect of which are purely temporal, and do not affect the spiritual concerns, or the toleration of any sect or denomination of christians whatever. If the character, and office, of the Petitioner, are within the letter and intention of this statute, he has a right to a register, if they are not, he has no such right. The British statute, 14th Geo. III, ch. LXXXIII, commonly called the Quebec Act, declared the law of Canada, as it stood at the conquest, to be the rule of decision, in all matters of controversy and civil rights; and, hence, the law of evidence, in this province, is materially different from the law of evidence in England. With us, deeds of conveyance, mortgages, &c., are executed before a notary, who is a public officer, appointed for that purpose by the Crown, and, with him, the original deed remains, in each instance, deposited of record; the parties have each a copy, certified by him to be an exact transcript from the original, and these copies are evidence in all courts of justice, and prove themselves, unless they are formally impeached as forgeries. This provision of the law of Canada is not, however, confined to notaries; it extends to all public officers who are appointed by the Crown, and have the charge of records of a public na-

ture, such as the prothonotaries of the Court of King's Bench, the secretary of the province, and others of a similar description. Any writings, which thus prove themselves, are denominated authentic (*actes authentiques*). If we inquire into this sort of evidence, as to *actes authentiques*, and it is material that we should, we shall find that it is founded on the principle, " That the Crown, holding the right of nomination to " office in trust, will not appoint to public offices, any other " than persons of whose good character and integrity it is as- " sured ; " as will appear from the following authority : " La confiance dans un acte authentique est fondée sur ce que le souverain, appréciateur du mérite et des talents de ses sujets, n'aurait point donné d'emploi dans l'ordre public, à l'officier, s'il n'avait eu un témoignage de ses mœurs et de sa capacité ; témoignage encore, qui se fortifie par l'enquête *de vie et de mœurs*, et par le serment qui précèdent sa réception."(1) Now, from this principle, it follows, necessarily, that the power of passing an *acte authentique*, cannot be derived, as to the officer who passes it, from any other source than from the Crown ; so that an *acte authentique* cannot emanate from any other than a public officer of the government. *Le Camus*, in his late edition of *Denizart*, defines an *acte authentique* in these words : " L'acte authentique est celui qui, étant consigné " dans un registre public, ou bien étant émané d'*un officier* " *public*, dans la fonction pour laquelle la loi l'autorise, se " trouve revêtu des solennités que la loi a prescrites." (2) The *Répertoire* expresses the same idea, in these words : " Les " actes authentiques sont ceux qu'a reçus *un officier public*, avec les solennités requises : les écritures privées sont les actes que font les particuliers, sans le concours d'un officier public." (3) And the language of the *avocat général Gilbert*, in the conclusions which he took, in the celebrated case of Bellingant, against the marquis de Hautefort, is to the same effect ; whoever passes an " *acte authentique*," says he, " *est le ministre public, de la loi, et du gouvernement temporel*, à qui *seul* il appartient de conférer le pouvoir d'imprimer aux actes l'authenticité."(4) From these general authorities, it is evident, that the right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries therein made, *Actes authentiques*, or records which, by the 20th title of the edict of 1667, was, at the conquest, vested in the

(1) 1 Rép. de Jur., 809.

(2) 1 L. C. Den., 159.

(3) 12 Rép. de Jur., 280.

(4) 1 L. C. Den., p. 165.

then parish priests of Canada, was by law considered to be so vested in them, not by reason of their spiritual or ecclesiastical character, but because they were, by law, the acknowledged public officers of the temporal government; a few extracts will confirm this inference.—" La loi veut que les actes de célébration de mariage soient écrits et signés, dans des monumens publiques qui servent de minute."—" Le ministre de l'Église est *comme officier public* en cette partie, et son acte a autant d'autorité en justice, que la sentence rendue par un juge, ou un contrat passé devant un notaire."(1) Il, le registre, doit être seulement signé par le curé qui a donné la forme à la minute, et qui, *en cette matière, est le ministre public*, nous ne dirons pas de l'Église, car, à cet égard, sa fonction ne serait que spirituelle, mais de la loi et *du gouvernement temporel.* (2) " Ces registres doivent être écrits de la propre main du curé, lequel n'a pas besoin d'affirmer, que ce registre est véritable, *est enim persona publica et sacerdos.*"(3) Then, as a register of baptisms, burials and marriages, is a record of a public nature, and, as all the entries therein made, are official declarations of facts, which by the express words of the statute, 35th Geo. III, ch. IV, are declared to be *actes authentiques*, (4) he that claims the right of keeping a register and to record baptisms, burials and marriages, contends, that his entry of such facts, is an *acte authentique*" and, consequently, must shew that he is a public officer. It is not then sufficient, for the Petitioner, to shew " that he has been ordai- " ned a christian minister, in the form used by the dissenters " from the Church of England called Congregationalists, and " that he performs the clerical duty of a protestant congregation of that *sect* of dissenters, in Quebec, he must go further, and shew, that a minister so ordained, is within the class and character of priests and ministers, contemplated by the statute, that his ecclesiastical character, and present office, are sufficient to enable him in *law*, to render his entries in the register which he demands, authentic. And to this end, he must shew that his ecclesiastical character, and present office, are both of public institution, and not of sectarian origin; that his authority in each, is derived from the public general government of the province, and not from a mere portion of its subjects; that he himself is a public, and not a private character; an officer, mediately, or immediately, of the King's

(1) 2 Cochin, 535 and 31, 780.

(2) 1 L. C. Den., 164, 165.

(3) Danty, 776.

(4) See the preamble and sect. 1.

appointment; and not the servant of a self-created society of individuals, not established, but simply tolerated by law; who, if they be of ecclesiastical denomination, have no more right to appoint an officer, for the execution of an act of parliament, than a lodge of freemasons, a friendly society, or any other voluntary association of a similar description.

Under the ordinance of the year 1667, which was the law antecedent to the statute, 35 Geo. III, ch. IV, the keeping of registers was entrusted to the *curés* of the roman catholic Church, and to their successors in office, and to such only; and the *curés* were vested with this authority, as priests, in holy orders, recognized to be such by law, and as *public* officers, in their respective stations. The late Provincial Statute does not change the character or qualifications of the persons to whom the keeping of registers is now to be entrusted: it extends the power of keeping registers to protestant ministers, but still requires that all persons keeping registers, whether catholics or protestants, should be priests in holy orders, recognized to be such by law, and public officers in their respective stations. The 15th section of the statute, accordingly, enacts, " that so much of the 20th title of an ordinance passed by His most christian Majesty, in the month of April, in the year 1667, and of a declaration of His most christian Majesty, of the 9th April, 1736, which relate to the form, and manner, in which the registers of baptisms, marriages, and burials, are to be numbered, authenticated or paraphés, kept and deposited, and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of the said ordinance and declaration, are, thereby, repealed, " so far as relates to the said registers only; " and, consequently, the ordinance and declaration are not repealed, with respect to the character and qualifications of the persons by whom they are to be kept, and by whom the entries of baptisms, marriages and sepultures, are to be made. In conformity to this general declaration, and to the ordinance of 1667, the 4th section of the statute (1) also, especially, enacts, " That every marriage shall be signed in both registers, by the person celebrating the mar-

(1) Cette section est en ces termes : Dans les entrées de mariage, dans les registres susdits, seront inscrits en lettres, les jour, mois et an de la célébration, les noms, la qualité ou occupation et demeure des contractants, s'ils sont majeurs ou mineurs, s'ils ont été mariés après publication de bans ou avec dispense ou licence ; et si c'est avec le consentement de leurs pères et mères, tuteurs ou curateurs, s'ils en ont dans le pays, aussi le nom de deux ou plusieurs personnes raisonnables qui auront assisté au mariage et qui déclareront s'ils sont parents du mari ou de la femme ou d'aucun d'eux, et de quel côté et en quel degré ils le sont, et telles entrées seront signées sur les deux registres tant par celui qui aura fait le mariage que par les contractants et par les dits deux assistants au moins ; et à l'égard de ceux qui ne savent ou ne peuvent signer, il en sera fait mention aux dits actes.

riage," who must, necessarily, be a priest in holy orders, recognized to be such by law. Since, by the law of Canada, a marriage can only be celebrated by such a character.(1) And the 5th section enacts, with equal precision, that entries of burials shall be signed by the *clergyman* who performs the burial service, which, again implies a clerk in holy orders, (2) recognized by law to be such, in contradistinction to pretented holy orders, and to persons pretending to holy orders, as they are termed in the ordination acts.

Upon these principles, we cannot do otherwise than reject the prayer of this petition.

Judgment, that the Petitioner take nothing by his petition. (3) *(Stuart's Rep.*, p. 90.*)*

An appeal was taken of this judgment, and the Court of Appeals, at *Québec*, on the 20th January, 1821, rendered the following judgment, *in re the Reverend George Spratt*, Appellant, and *the King*, Respondent.

RICHARDSON, *executive councillor:* It neither was, or could be, the intention of the Legislature, by this statute, in employing the words " Protestant Churches, or Congregations," to throw open the door, respecting the keeping of such registers, indiscriminately to all protestant sectaries, hereafter, without restriction. In such case, the evil would have become greater than that meant to be remedied. At the time when this statute was passed, there were no other protestant churches, or congregations, in this province, than those in communion with the churches of England and Scotland; and, therefore, the interpretation of the act, that such only were intended by it, is corroborated. This question has no relation to the exercise of religious worship without restraint. This court neither can, nor does it mean to touch or affect full religious toleration. The present case respects a civil office of great importance to the temporal and civil rights of His Majesty's subjects, in regard to the proofs to be adduced of legitimacy, when the transmission of property may become a matter of legal contest; such an office, as keeper of such a register, cannot be claimable by any person, as of right, unless the act conferred that right. This court does not consider it to be so conferred. The decision has no reference to the education and moral character of the Appellant, which are understood to be most respectable. It is confined to the interpretation of the law, without reference to persons. Neither does the court mean to say that the keeping of such registers is incapable of being

(1) Ord. of 1539, and 2 De la Jannès, 9.

(2) 4 Black. Com., 217.

(3) See the *Pandectes françaises*, vol. II, pp. 244, 245.

extended, under proper safeguards, against abuse. That must depend upon the wisdom of the Legislature, (1) and, if our interpretation be erroneous, it is for the Supreme Court of Appeals to correct the decision.

The judgment of the court below is affirmed, and this appeal dismissed, but, without costs. *(Stewart's Rep.*, p. 149.)

SALE.—RES PERIT DOMINO.

COURT OF KING'S BENCH, Quebec, 19th October, 1816.

McDOUALL, against FRASER.

Held: That, if property after a sale perfected, is burnt by accident, before delivery, the loss falls on the purchaser. (2)

McDouall, having a bill of exchange drawn on Fraser, for £1000, agreed to accept in payment a quantity of gin and sugar, lying in a warehouse belonging to Bréhaut and hired by Fraser. The latter gave an order to Bréhaut to deliver to McDouall the entire quantity of gin and sugar which McDouall had thus purchased; a bill of parcels was made out by Fraser, with a receipt for the amount, and McDouall gave up to him the bill of exchange. The sale was thus concluded, on the 2nd of August, and, on the 12th of September following, McDouall took from Bréhaut's warehouse, the whole of the gin, being 464 gallons, and 4481 pounds, being part only, of the sugar of which the value was £791 14s. 5d., and left the remainder of his purchase (which consisted entirely of sugar), in the warehouse where it was consumed, accidentally, by fire, a few days afterwards: no cause was assigned for the delay which had taken place in removing the gin and sugar from Bréhaut's warehouse, and it was in

(1) Since the decision, in this case, the following statutes have been passed, viz. : —

An act to extend privileges therein mentioned, to the religious classes of persons denominating themselves Wesleyan Methodists, 9 and 10, Geo. IV, ch. LXXVI.

An act to extend certain privileges, therein mentioned, to persons professing the Jewish Religion, and for the obviating certain inconveniences to which others of His Majesty's subjects might otherwise be exposed, 9 and 10, Geo. IV, ch. LXXV.

An act to afford relief to a certain religious congregation, at Montreal, denominated Presbyterians, 1 Will., IV, ch. LVI.

An act to enable the regularly ordained ministers of the United Associate Synod of the Secession church of Scotland to keep authenticated registers, according to law, 3 Will., IV, ch. XXVII.

An act to afford relief to a certain religious congregation, at Montreal, denominated Baptists, 3 Will., IV, ch. XXIX.

(2) V. art. 1025, 1026 et 1472 C. C.

evidence, that Fraser, in the month of August, had summoned McDouall to remove them. This action was to recover the value of the sugar which had not been received by McDouall.

SEWELL, CH. J: As soon as a sale is perfected, the thing sold is at the purchaser's risk, and, if it perishes, without any neglect on the part of the seller, the purchaser must bear the loss, even in cases in which a delivery has not been made. (1) The sale, in this case, as to the sugar, was of a certain number of hogsheads lying in Bréhaut's warehouse, and, as it does not appear that any others belonging to Fraser were there, it was a specific sale, and the above rule applies. It is, moreover, doubtful, whether a delivery of the whole was not made. But, at all events, it is in evidence that McDouall was summoned (under protest), by Fraser, some days before the fire, to take away the remainder of his sugar, and was, therefore, *en demeure*, for he was bound (as it was not otherwise stipulated) to receive the things he had purchased at Brehaut's store, (2) and to remove them from thence, in a reasonable time. (3) There is neglect, therefore, on the part of McDouall, and none on the part of Fraser, and the loss being thus evidently a consequence of McDouall's default, because, if he had removed the sugar, as he was bound to do, it would not have been burnt in Brehaut's warehouse, he must abide by the loss.

Action dismissed. (*Stuart's Rep.*, p. 101.)

OBLIGATION.—LOCUS REGIT ACTUM.

COURT OF KING'S BENCH, Quebec, 19 October, 1816.

ALLEN, against SCAIFE and others.

Held: That the law of the country, in which a contract is made, and its usages, most govern in mercantile cases. (4)

A quantity of timber was shipped in Canada for Liverpool, at forty shillings per load, the contract being entered into and concluded at Quebec, and the freight payable in Liverpool. The merchant at Liverpool, on the arrival of the timber, pays freight at the rate of forty shillings, for forty square feet, that quantity being a load at Liverpool; but, finding

(1) 17 Rép., de Jur., 481, *verbo* vente, sec. 4 § 1.
5 Ferr. *Instit.* 111.
Domat, *Contrat de vente*, *Tit.* II, § 1 art. 2, and sec. 7, art. 2.
Pothier, *Vente*, nos 56. 307.

(2) Poth., *Vente*, nos 52. 290. 291.

(3) 2 Comyns *on Contracts*, 213; 17 *Rep.*, de Jur., 482, *verbo* vente.

(4) V. art. 8 C. C.

afterwards, that a load at Quebec was fifty square feet, brought this action to recover back the difference.

Per Curiam: The general principle, *locus regit actum*, must govern this case. As to the estimation of a load, there is, it seems, one quantity in a Quebec load, and a smaller quantity in a Liverpool load; but, as the contract was commenced and finished at Quebec, if the parties meant the latter, they ought to have expressed their intention, for, otherwise, the law refers the parties to the former. The Plaintiffs have overpaid the Defendants erroneously, having no knowledge of the quantity contained in a Quebec load of timber, and the Defendants must therefore refund. (1) *(Stuart's Rep.*, p. 105.*)*

PROCEDURE.—PLEADINGS.

COURT OF KING'S BENCH, Quebec, 20th February, 1817.

PACQUET *vs.* GASPARD.

Held: That, an exception to matter pleaded by exception may be fyled, even under the ordinance, 25 Geo. III, c. II, § 13. (2)

This was an action *Petitio hereditatis*, brought by the Plaintiff, as heir at law to Françoise Pacquet, to recover from the Defendant a piece of land and dwelling house, situate in the city of Quebec, of which the said Françoise Pacquet died seized and possessed.

To the Plaintiff's demand the Defendant pleaded by perpetual exception, the last will and testament of Françoise Pacquet, by which she devised to him (the Defendant), the piece of land and dwelling house in question. To this exception, the Plaintiff answered specially, alleging, that the Defendant was incapable of holding real estate, because he was an alien, born in France, and had never been naturalized, and upon these allegations the Defendant took issue by simple denegation of the facts. At the hearing, the ADVOCATE GENERAL (Pyke), for the Defendant, complained of the operation of the Ordinance, 25 Geo. III, c. II, § 13, (3) which enacts, "that every issue,

(1) 2 Comyn, *on Contracts*, 24; 2 Burr., 1077, *Robinson* vs. *Bland*; 2 De la Jannès, 324, p. 588.

(2) V. art. 148 C. P. C.

(3) Cette section est en ces termes:

"Tous plaidoyers sur la loi, ou sur le fait, dans toutes actions pendantes dans les Cours des Plaidoyers communs entre les parties, Demandeur et Défendeur, seront insérés dans la déclaration, la réponse et la réplique, ou, en cas d'exceptions préliminaires ou au fonds, dans le plaidoyer, la réponse et réplique des dites parties, Demandeur et Défendeur; et qu'aucun autre écrit comme plaidoyer dans le procès, ou action et affaire en dispute, soit sur la loi, soit sur le fait, ne sera reçu et admis par les dites Cours des Plaidoyers communs, comme partie du dossier et devant y être compris dans aucune cause qui y sera intentée, et on ne sera pas entendu, et il ne sera pas adjugé Indoritus, nonobstant toutes choses à ce contraires."

in law or fact, shall be made and completed by the declaration, answer and replication; or, by the plea, answer and replication, in cases of abatement and bar, and that no other or further pleadings, or writings by way of plea, upon such issue or matter in dispute, shall be received;" — he said that, by this clause, he had been compelled to take issue, upon a fact which he could not deny, viz.: "that the Defendant was born in France," and had been deprived of the opportunity of setting forth the circumstances, which shewed, that, notwithstanding that fact, he was born a subject to His Majesty, that, true it was he had been born in France, but that he was there born of British parents of the name of Sinclair, who were there accidentally, and for a short time only, and were driven thither by stress of weather from the high seas, this, he said, he was prepared to shew, and that the place of the Defendant's nativity was a British ship, in the harbour of Dunkirk: that the greatest injustice would be done to the Defendant, if he could not be permitted to plead, and to prove these facts, he would lose his property and his character of a British subject, although he was manifestly entitled to both.

SEWELL, CH. J: There must, necessarily, be a material distinction between a replication, which admits the truth of facts stated, in answer to an exception, and a replication which denies that they are true. The ordinance, in order to prevent all unnecessary prolixity in pleadings, has provided "that every issue shall be made and completed by the plea, "answer and replication, in case of abatement and bar," and, in all instances in which, from the nature of the case, the issue is, or can properly be raised, by a plea to the declaration, an answer thereto, and a replication, no further pleadings or writings, by way of plea upon such issue, can be received, and none ought to be received, because an issue is already perfected. But, in cases in which, from the nature of the facts, an issue cannot properly be raised by these pleadings, it would be absurd to say that the ordinance intends to exclude all futher pleadings and there to terminate the cause. Can it be supposed that the law-giver meant to deprive the parties, in any suit, of the natural right of stating their own case, in the way which their interests fairly require, or to compel them to raise issues, upon facts which they cannot controvert, without injury to their pretensions? Surely, it cannot be. The intention of the ordinance is to prevent all unnecessary prolixity, and confusion in pleading. It, therefore forbids the admission of further pleadings, in all cases in which an issue has already been raised, by enacting "that no further pleadings or writings, by may of plea" shall be received. But, as to further pleadings, in cases in which no

issue has been raised, it is silent. How can such further pleadings be pleadings upon an issue, where there is no issue? When facts are set forth affirmatively, in a plea of exception, the facts which have been previously stated in the declaration, are either admitted to be true, or, it becomes indifferent whether they are true or false, and, thus, they cease to be objects of contest or inquiry in the cause. By the exception, an issue on the matter which it alleges is tendered to the Plaintiff, and if that matter is denied to be true by his answer, an issue is raised upon it. But, if on the contrary, he admits it to be true, and, in a special answer, states other facts which shew that it cannot prevail, the issue thus tendered by the Defendant is refused, the matter stated in the exception ceases also to be an object of contest or inquiry in the cause, and a new issue, on the facts which are alleged in the Plaintiff's special answer, is tentered to the Defendant. These facts may, of course, be again admitted in their turn to be true, and their effect may be destroyed by new matter alleged in a special replication; and, where this is the case, if the Plaintiff is not permitted to answer this new matter, it is plain that, as there is yet no controversy between the parties, there is not, and cannot be an issue for trial, or a decision in the cause. To prevent a denial of justice, therefore, a "further pleading," or "writing by way of a plea," to the matter alleged in the special replication, in such cases, must necessarily be allowed, and this, if it be not according to the strict letter, is, nevertheless, the spirit of the ordinance; for facts affirmatively stated, in any pleading, subsequent to the declaration, and in answer to any matter which is alleged in a preceding pleading, are pleaded by may of exception " in bar" to such matter. If the facts set forth in a special replication, in any case, in which no issue has previously been raised, are denied in the answer thereunto given, and a general replication is thereupon fyled, the issue is raised, as the ordinance requires, in cases of bar and abatement, viz.: by the plea in which such facts are so alleged, by way of exception, by the answer thereto, and by the replication.

In the present case the Plaintiff sues for a piece of land and dwelling house, as the heir of Françoise Bacquet, *en pétition d'hérédité.* To this demand, the Defendant pleads title, by the last will and testament of Pacquet, by a perpetual peremptory exception. The Plaintiff's answer to this exception admits the will, but alleges that the Defendant was born in France, and being, therefore, an alien, is incapable of inheriting real property by will, or otherwise, and, upon this, the issue has been joined. Both parties admit that it is irregular, and, well they may, for it is directly contrary to the facts of

their case. The Defendant, by a special replication, should have admitted that he was born in France, and, thereupon, alleged, as he has verbally stated, that he was there born of British parents, who, at the time of his birth, were temporarily and accidentally in France, and had been driven thither by stress of weather from the high seas: and, upon this allegation, which constitutes the true and only point of controversy between the parties, the Plaintiff would have taken issue by an answer denying it to be true, and by a replication (if such pleading be necessary), the issue would have been joined and completed.

To enable the parties to adopt this course, and to put the cause upon its proper footing, there ought to be a repleader.

A repleader from the perpetual exception ordered. (*Stuart's Rep.*, p. 106.)

LEGISLATIVE ASSEMBLY.—PRIVILEGES.

COURT OF KING'S BENCH, Quebec, 22th March, 1817.

Ex parte SAMUEL WENTWORTH MONK.

Held: **That a prisoner committed by the Assembly, to the common goal, *during pleasure*, is discharged by a prorogation.**

During, the session of the Provincial Parliament, in 1817, Samuel Wentworth Monk was committed, by the Assembly, to the common gaol of the district, *during pleasure*, for a contempt. The Parliament was prorogued on the 22d day of March, and, on that day, the court, then sitting for the trial of crimes and criminal offences, on motion, granted a writ of *habeas corpus*, and the above cause of detention being returned, it was moved that Samuel Wentworth Monk be discharged.

PER CURIAM: The counsel for Mr. Monk have avoided all arguments upon his commitment, and upon the inaccuracies, if any, of the warrant by which he was confined; and, in so doing, they have acted rightly. It is laid down as a settled principle by Hawkins, "that a person committed for contempt, " by the order of either House of Parliament, may be " discharged by the Court of King's Bench, after a dissolution " or prorogation of the Parliament:"—"For" as he observes, " all orders of parliament are determined, by a dissolution or prorogation and all matters before either House must be commenced *de novo*, at the next Parliament, except only the

case of a writ of error." (1) An exception to which, impeachments, was added by the decision of the Commons in the case of *Warren Hastings*. (2) By modern cases, this principle has been confirmed, and the decisions in the case of the *Queen* vs. *Paty*, (3) of *Brass Crosby*, (4) and of sir *François Burdett*, (5) have put it beyond all doubt. The question before us is thus limited to the enquiry, "whether the Provincial Parliament is prorogued," and independent of the proof that it has been this day prorogued, contained in the affidavit before us, it is a fact which, with the passing of the acts of the Legislature, we are bound to notice. Without determining, therefore, whether the detention of Mr. Monk was legal or illegal, whether the warrant, by which he is detained, is accurate or inaccurate, in point of form, or whether his commitment, in any respect, was right or wrong, we must discharge him, upon the ground that the period for which he was committed has expired. (*Stuart's Rep.*, p. 120.)

PROCEDURE.

COURT OF KING'S BENCH, Quebec, 20th June, 1817.

POZER and another, against CLAPHAM.

Held: That in a commercial matter, if it appears, in an action of assumpsit, at the trial, that the Plaintiff has a partner who was a party to the contract, and is not a party to the suit, the action will be dismissed, although the Defendant has not pleaded the facts. (6)

This was an action brought by two copartners in trade, against the Defendaut, a merchant, to recover from him a certain sum which the former alleged had been overpaid to him, upon the sale of a bale of Flushings effected by the Plaintiffs, for the Defendant, at auction, and, at the trial, it was proved that the Plaintiffs had another partner, who was a party in the whole transaction.

(1) 2 Hawk. P. C. ch. xv, § 74. (2) 4 Black Com., 399, note (2.)

(3) Ld. Raymond, 1106, 1108.

(4) 3 Wilson, 188 ; 11, Hargrave's *State trials*, 335.

(5) 14 East. 1 and 163 ; 5 Dow's Parl. Cases, 165, 199 ; See, also, the judgment of the Supreme Court of the United States, in *Anderson* vs. *Dunn*, 6 Wheat, *Rep.*, 204 ; 1 Kent's Comm. Lect. 11, p. 221, and 2 Story's Comm. on the Constitution of the United States, p. 308. The English Law Magazine, for July, 1831, p. 1, contains also a learned article on this subject.

(6) V. art. 120 C. P. C. § 8.

PER CURIAM: This is clearly a commercial matter,(1) and, consequently, as the proof must be weighed according to the rules of evidence laid down by the laws of England, it follows that the contract laid in the declaration is not proved, the contract, in evidence being, according to that rule, another contract, because it is not between the same parties, (2) and, of this, the Defendant is permitted to take advantage at the trial, although he has not pleaded that one of the joint contractors is not a party to the suit. (3) The action must be dismissed, *quant à présent.*

Judgment for the Defendant. (*Stuart's Rep.*, p. 122.)

SURETYSHIP.—CO-SURETIES.

COURT OF KING'S BENCH, Quebec, 20th October, 1818.

JONES, against LAING, and HEBERT, Opposant.

Held: That a *fidéjusseur* has his action against a *co-fidéjusseur*, for his proportion of the sum which he has paid for their common principal, but, if there be no convention to the contrary in the deed by which he became security, his action is only for money paid, and, consequently, he can have no mortgage upon the property of the *co-fidéjusseur*, until he has obtained a judgment, and then, only, from the date of that judgment. (4)

An individual of the name of James William James, contracted with Sir William Robinson, to supply the garrison of Quebec, with bread, for a fixed period, and, for the due execution of this contract, Messrs. *Laing & Hebert* became his *cautions*, or securities *solidaires*, in a penalty of £1500. James having failed and absconded, Hebert, with the consent of the commissary general, continued to execute the contract, at an expense to himself of £750, and, Laing also becoming insolvent, his real property was seized by a creditor, and sold by the sheriff, and, upon this sale, Hebert fyled an opposition *à fin de conserver*, for the moiety of the sum so advanced by him, on account of James, and this opposition being contested.

SEWELL, CH. J: The money to be distributed in this case is no other than the proceeds of the real property of Laing, the *cofidéjusseur*. If Hebert had been subrogated to the rights of the creditor (Robinson), he might perhaps have supported an action against Laing, for his proportion of the

(1) V. la cause de *Pozer* vs. *Meiklejohn*, p. 59.

(2) 2 Str., 820, *Leglise* vs. *Champante*, 2 T. R. 282; *Graham* vs. *Robertson*.

(3) 1 Philipps on Ev., 130.

(4) V. art. 1955 C. C.

sum paid by him for James, and his mortgage might have taken effect, from the date of the contract between Robinson, James and his sureties. (1) But as there has been no subrogation, although Hebert has against Laing, for his moiety, an action for money paid and advanced, he has no mortgaga security upon the property of Laing for the sum due by him until a judgment has been obtained. (2) The contestation of Hebert's opposition must therefore be maintained. (*Stuart's Rep.*, p. 125.)

BANKRUPTCY IN ANOTHER COUNTRY.

COURT OF KING'S BENCH, Quebec, 20th October, 1818.

BRUCE, against ANDERSON and RANDALL, and others assignees, Opposants.

Held: That an English commission of bankruptcy operates, in Canada, as a voluntary assignment by the bankrupt. The assignees, therefore, may sue for debts due to the bankrupt, or for his property, and may take the share of the proceeds of the bankrupt's estate which belongs to the English creditors, but, such proceedings of the assignees cannot deprive the provincial creditors of any acquired rights or privileges, as to the property of the bankrupt, or the proceeds thereof, to which they, by the law of Canada, may be entitled, nor can such rights, or privileges be affected by the commission, or by the assignment. (3)

Anderson, a merchant of Quebec, in desperate circumstances, went to London, where a commission of bankruptcy having been sued out, he was regularly declared to be a bankrupt. He then returned to Quebec, and one of his

(1) 2 Henrys 853; Lepretre Cent., 2, ch. LX; Louet, *lettre* R, ch. XI; 1 Domat, 256, liv. III, tit IV. § 4. n. 1; Renusson, *Subrogation*, ch. IX, n° 17, p. 61, and 2 Argou, 425.

(2) Pothier, *Obl.*, n° 445; Règle de droit, par Pocquet, d. 1; Livonière, *Cautions*, n° 7, p. 379; 2 Henrys, 856; Renusson, *Subrogation*, ch. IX, n° 19, p. 61.

Note—Quoique le cofidéjusseur ne prenne point cession d'action du créancier, il ne laisse pas d'avoir la même hypothèque que le créancier avait, sur les biens du principal obligé, ce qui se fait par une tacite *subrogation*.

Basnage, *Hypothèque*, 8°, p. 566; Vide *Chapman* vs. *Harrison*, in appeal, Nov., 1828.

Renusson, *Tr. de la Subrogation*, p. 59, ch. IX, n°s 2, 3, and 4.

Renusson states, that the *cofidéjusseur* who has paid the principal debt, and was bound with the principal debtor in one and the same obligation has the action *mandati*, for the recovery of the sum he has paid against the principal debtor, and that the action *mandati* in such case is *hypothécaire*, and that his mortgage dates from the day on which the obligation was executed. He adds that the action *negotiorum gestorum* is a pure personal action. See also 5 Poth. in-4°, 420; 8 Rep. de Jur., 632-635; 9 L. C. Den., *Hypothèque*, § 6. p. 764.

(3) V. art. 6 et 7 C. C.

creditors (*Bruce*), instituted an action against him, obtained judgment, and took his property real and personal, in execution. Randall and others, the assignees of his estate, had, in the meantime, sent out a letter of attorney, and, upon the seizure of his property by the sheriff, an opposition *à fin de conserver*, was fyled on their behalf. It was contested, and the parties having been heard upon the issue thereby raised.

SEWELL, CH. J: The general question, which is, by this case, submitted to our determination, has been left almost entirely to the regulation of those principles and rules of international law which guide the connections between states, and prescribe the sanction and authority which is to be allowed by each, to the institutions and laws of another. (1) The determinations of the courts of Westminster Hall, have uniformly admitted the title of foreign assignees. (2) The same doctrine has been fully established in Scotland and in Ireland, (3) and the consequence is, that a commission of bankruptcy in England, or in Ireland, and the assignment following upon it, or a sequestration, in Scotland, and the conveyance, in that country, to trustees, have, at least, the effect of transferring to the trustee or assignee, the whole personal estate of the bankrupt, so far as to defeat all undue preferences attempted to be gained in the country where the estate happens to be found, either by action instituted by the creditors, or by voluntary conveyance, made by the bankrupt, after the period at which the effect of the commission of bankruptcy attaches to the funds of the bankrupt. (4)

As to real property, and the question how far an English commission of bankruptcy can affect such property, out of England, but within other dominions of the crown, it is broadly said by Cullen "that real property seems to be equally within the spirit of the law," "but," he adds, "as to the manner in which the assignees are to come at property of this kind, not only, out of the reach of the jurisdiction of the courts of England, *but subject to such positive institutions and local usages as every where govern both the enjoyment and transfer of real property*, (5) I am not aware of any authority. But,

(1) Bell's Com., 630.

(2) *Ib.*, 632; *Sill* vs. *Worswick*, per lord Loughborough, 1 H. B., 690; *Solomons* vs. *Ross*, and *Jollet* vs. *Reitreldt*, and *Deponthieu* vs. *Basil*, cited, Bell, 631, note c.

(3) Bell's Com., 632, text and note (e); 1 H. Black, 690, 691, *Bank of Scotland* vs. *Cuthbert*, in 1813.

(4) Bell's Com., 631, 632, n. 2 in text; Niel, assignee of *Gratton* vs. *Cottingham*, 1 H. B., 132; Cullen, 185.

(5) Bell's Comm., 635, Cullen, 185.

upon this point, it is held, in Scotland, that proceedings in foreign bankruptcy, *i. e.* in any bankruptcy judicially declared, out of Scotland, will not, *ipso jure*, operate as a conveyance to assignees, or a divestment of the bankrupt, *so as to bar the preferences, by mortgage or otherwise, to which other creditors may be legally entitled upon such real property*, but that such proceedings will enable the assignees to enter into competition with all other creditors who may seek to attach the estate of the bankrupt, and will also enable them to take such further proceedings as may, by the local law of Scotland, be required to complete the assignment to themselves. (1) In strict accordance, also, with these principles, it has been decided, in England, that actions, by English assignees, may be maintained, in the plantations, for debts due to the bankrupts estate, or for the property of the bankrupt, (2) but, as the bankrupt law of England does not extend to the colonies, that the assignment to such assignees has no other than the effect of a voluntary assignment; and, of itself, does not divest the bankrupt of his property in the colonies, and, consequently, that it does not affect any right, or privilege, to which a creditor may be previously entitled, with respect to any portion of the property of the bankrupt, which is found in any of the provinces. It follows, necessarily, from what has been said, that the opposition of the assignees *à fin de conserver*, upon the proceeds of the estates, real and personal, of the Defendant Anderson, must be maintained, and they must be collocated, according to their rights and privileges, and the respective rights and privileges of the Defendant and Opposants. (*Stuart's Rep.*, p. 127.)

(1) *Clere* vs. *Mills*, 1 H. B., 680; *Mawdsley* vs. *Parke*, 1 H. B., 681; 2 Montague, 508.

(2) 1 H. B., 681; 2 Montague, 505, 508; 1 H. B., 680, *Waring* vs. *Wright*, *Richards* vs. *Hodson*, cited in 4 T. R., 187; *Hunter* vs. *Potts*, 4 T. R., 192.

Note.—At the time of the bankruptcy of the Defendant Anderson, he had his domicile in Quebec, yet the proceeds of his personal property were, on that account, to be distributed according to the law of Canada, and, as he was insolvent, *en déconfiture*, the distribution was, therefore, to be *au marc la livre*.—*Vide* 6 L. C., Den., *verbo* Domicile, sec. 5, n. 5, p. 666; 5 Cochin, 85; Lord Loughborough's judgment, in *Sill* vs. *Worswick*, 1 H. B., 699; Bell's Com., 632, text and note (f); *Bruce* vs. *Bruce*, 2 Bos. and Pul., 230.

As to questions arising in the courts of Canada, upon facts, contracts, discharges, etc., which take place between foreigners, in their own country, see Bell's Com., 635; *Potter* vs. *Brown*, 5 East, 124; 10 Toullier, nos 74, 79, p. 117; 2 Kent's Com., 350; 8 American Jurist, 289; 9 L. C. Denizart, p. 759, col. 2, hypothèque.

PEW.—RIGHTS OF THE ELDEST SON.

COURT OF KING'S BENCH, Quebec, 20th February, 1819.

BORNE, against WILSON and others,

Churchwardens of the Roman Catholic Parish Church of Quebec, and against BÉLANGER.

Held: That the eldest son of the *concessionnaire* of a pew is entitled to have it, upon the remarriage of his father's widow, at the price at which it may then be adjudged to the highest bidder.

The churchwardens (*marguilliers*) of the Roman Catholic Parish Church of Quebec, conceded a pew, in the year 1771, to George Borne, the Plaintiff's father, who died in 1814, leaving no other issue than the Plaintiff. During his life, the pew in question was occupied by George Borne, and, after his decease, by his widow, until the year 1817, in which year, she having married again, and having quitted the parish of Quebec, the pew, by order of the Defendants, the churchwardens, was put up at auction, and adjudged to Bélanger, the other Defendant, at an advanced rent, upon which, the Plaintiff demanded the pew of the churchwardens, upon the ground of his being the only son of George Borne, and willing to pay the rent at which it had been adjudged to Bélanger, and, the marguilliers having refused his application, this action was brought to evict Bélanger, and to compel the churchwardens to allow the Plaintiff to use and occupy the pew at the advanced rent.

PER CURIAM: As to the form in which this action has been brought, it has been instituted against the Defendant, who is found in the occupation of the pew, under title from the churchwardens; and, the churchwardens, having been made parties to the suit, have, thereby, been enabled to justify the title they have given to the present occupant Bélanger, and to shew that it excludes the Plaintiff from the privileged preference which he claims over Bélanger, the *adjudicataire* of the pew. This is certainly a fair proceeding, and, as it has been supported by the precedent, which has been cited from the edicts and ordinances, (1) we see no reason to impeach it.

As to the merits of the action, the churchwardens were, undoubtedly, right, when they put up the pew to auction, upon the second marriage of the widow of George Borne, the father of the Plaintiff, the règlement of the 9th June, 1723, under the royal signature, having enacted generally, "que les

(1) Vol. II, p. 303.

veuves, *qui resteront en viduité*, jouiront des bancs concédés à leurs maris, en payant la même rente portée par la concession qui leur en aura été faite." (1) But, under the same règlement, the Plaintiff, in consequence of his mother's *second marriage*, has now a privileged claim of right, to the pew conceded to the father, provided he is willing to take it at the price at which it was adjudged to the present occupant Bélanger, and this he is willing to do. His action, therefore, must be maintained, no efficient cause to the contrary being shewn, either by the churchwardens or by Bélanger. (2)

Judgment for the Plaintiff. (3) (*Stuart's Rep.*, p. 133.)

COMPLAINTE.—PEW.

COURT OF KING'S BENCH, Quebec, 13th April, 1819.

AUGER, against GINGRAS.

Held: That *complainte* cannot be maintained, for a disturbance, by entering a pew, in a church, by one parishioner, against another. (4)

A demurrer, by *défense au fonds en droit*, to an action of *complainte*, against a parishioner of a Roman Catholic parish church, by another parishioner, for entering upon, and disturbing the latter, in the possession and enjoyment of his pew, having been pleaded, and the parties heard ;—

PER CURIAM: *Complainte* is founded in possession, and, therefore, will not lie, for a disturbance, by entering a pew, because the possession of a pew does not vest in a parishioner, but in the *curé*, and *marguilliers*, in whom the possession of the whole church resides. (5) An action in *factum*, therefore, is the proper remedy, by one parishioner against another, for a disturbance of this description, (6) and an action *d'injure*, if the cause of complaint amounts to a *voie de fait*. (7) It must, however, be observed, that in any action founded upon a disturbance *en droit*, by intrusion into a pew, the Plaintiff

(1) 1 Edits et Ordon, 434.

(2) 1 Edits et Ordon., 434, vol. II, p. 303 ; Gouvernement des paroisses, 59.

(3) Affirmed in appeal, on the 19th January, 1822.

(4) V. art. 946 C. P. C.

(5) 4 Pothier, *Possession*, n° 37, p. 535 ; *Stocks* vs. *Booth*, 1 T. R., 428 ; 1 Burn's Ecclesiastical law, 343, 344 ; 1 Dict. Can., 431, 432 ; 17 Rep., 605, Droits Honor. Marechal, ch. III et IV ; 3 Mem. du Clergé, 1408, 1433, et 1602 ; 2 Arrêts cited in 2d. Rép., de Jur., 121, *verbo* banc.

(6) *Stocks* vs. *Booth*, 1 T. R., 428.

(7) 17 Rép. de Jur., 229 and 605.

must allege title to the pew (from which he claims the right of excluding others), derived from a concession (or faculty as it is termed in the canon law), or from some other source, if there be any other which he may claim. A quasi possession "qui ne consiste que dans des droits," is the utmost that any parishioner can even pretend to have in a pew, and, to every action which is founded upon a quasi possession of this character, title is essential, and must, therefore, be alleged and proved. (1) Now, the declaration is in this respect entirely defective. There is not an allegation of any kind, as to title of any description, in any part of it. It fails, therefore, as well in the libel, as in the conclusions, which are those of the action *en complainte* simply. For these reasons, the demurrer must be maintained, and the action dismissed, *quant à présent.* (*Stuart's Rep.*, p. 135.)

ABSENT.—PRESUMPTIVE HEIR.

COURT OF KING'S BENCH, Quebec, 20th April, 1819.

GAUVIN, against CARON.

Held: That no action, *en revendication*, can be maintained, by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possesion, by virtue of an *envoi en possession*, or a final *délivrance* of the estate and succession. (2)

This was an action by the heir of a person who had left the province, several years before it was instituted, and was supposed to be dead.

PER CURIAM: This action cannot be maintained. The property, moveable and immoveable, of an absentee, who has left the country, without appointing any agent or attorney to take charge of it, is, from the date of his departure, in the care and custody of the King's courts, and, in such case, they will, in the first instance, appoint a curator. (3) At the expiration of ten years, calculated according to circumstances, from the date of his departure or from the date of

(1) *Stocks* vs. *Booth*, 1 T. R., 428; 5 L. C. Den., *complainte*, sec. 2, n° 3, 9, 10, 11, and 12, and vol. III, p. 179; Bancs dans les églises, sec. 6, n. 2; Pothier, *Possession*, n°s 90, 91, 92: Règlement of 9th June, 1723; 1 Ed. et Ordon., 434. Serpillon *C. C.*, 282, 283, art. 5. note 2; Domat, liv. III, tit. VII, sec. 1, n. 5, p. 260; Poth., *Possession*, n°s 90, 91; L. C. Den. *Complainte*, sec. 2, n°s 9 and 10. Vide *Wexler* vs. *Wilson*, B. R. Q., 1820, n° 810.

(2) V. art. 87, 91, 93 et 98 C. C.

(3) Règlement sur les Scellés. liv. I, ch. XVII.
Questions de Brettonier, vol. I, p. 12.

the last intelligence respecting him, they will put the presumptive heirs into possession, by an *envoi en possession*, (1) and, after a lapse of thirty years, or, sooner, upon due proof of the death of the absentee, *intestate*, they will finally invest the heirs at law with the possession of the estate and succession of the absentee, *en pleine propriété*. (2) The Plaintiff, in this action, is not entitled to the possession of the property which he demands, either as curator to the estate of the absentee, or by an *envoi en possession*, or by a final *délivrance* of the estate and succession, and he produces no evidence, not even a single presumptive proof of the death of the absentee. (3) He cannot, under such circumstances, recover in this action.

Action dismissed, *quant à présent*. (*Stuart's Rep.*, p. 136.)

SALE.—DELIVERY.

COURT OF KING'S BENCH, Quebec, 19th October, 1819.

RIVERS, against DUNCAN.

Held: That merchandize, imported from abroad, is delivered to the consignee, when placed on the wharf, and is, from thence, at his risk, provided notice of the arrival of his goods has been given to him. (4)

This was an action of damages, for the non-delivery of goods received by the Defendant, a master of a ship, on freight, for the Plaintiff. Upon the trial, it appeared that four bales of woollens had been shipped, addressed to the Plantiff, and were brought, in good condition, to Quebec, that the Defendant, repeatedly, gave notice to the Plaintiff of the goods being on board, and requested him to remove his bales, as they were lying on the upper part of the cargo. That, in the first instance, the Plaintiff said he had no advice of the bales, but, afterwards, promised, more than once, to take

(1) *Ib.*, pp. 12, 14.

(2) *Ib.*, p. 18.

(3) 6 Poth., 123, 4; 7 L. C. Den., 716, n° 1, and 717, n°s 6, and 7; 2 Pig., p. 3; 1 Rép. de Jur., 67; Lebrun, *Successions*, p. 2, § 1; Charondas, *Réponses*, lib. VII, R., 106 and 107.

An *envoi en possession* is not inheritance by succession, it is a species of sequestration, which entitles the heirs to the possession, and to the administration only of the estate of their ancestor. They obtain this possession, because they are, apparently, better entitled to it than strangers, but they do not acquire any right of property in what they possess, they cannot sell or mortgage, and they give security to account and refund, if their ancestor should return, 1 Rép., 68; 3 Pandectes françaises, 16. See also 1 Bretonnier, *Quest. de dr.*, p. 11.

(4) V. art. 1493 C. C.

them away. He did not however do so, and, after some days, the Defendant put them on the wharf, where they were seized, for non-payment of the duties.

PER CURIAM: In the case of ships coming from a foreign port to the port of London, delivery, at a wharf, discharges the master, (1) and, upon the evidence adduced in this court, in the case of *Patterson* vs. *Davidson*, (2) this was held to be the rule of the port of Quebec, if the consignee had notice of the arrival of his goods. In the case before us, Rivers, the consignee, was bound to look after his bales of woollens, from the moment he was informed of their arrival, and, he was repeatedly required to take them away. The omission to enter them at the custom house, which it was his duty to do, was gross negligence, *crassa negligentia*, on his part. The goods, after a considerable lapse of time, were delivered on the wharf, as is customary, and, if the steps which were necessary to protect them against seizure, for the non-payment of the King's duties, were not taken by Rivers, the laches are his own, and he must necessarily abide by the consequences. For these reasons, we fully concur with the jury, in the verdict (3) which they have found for the Defendant, and reject the motion which has been made by the Plaintiff, for a new trial.

Judgment for the Defendant. (*Stuart's Rep.*, p. 139 et 2 *Rev. de L.*, p. 75.)

MANDATE.—CONTRACTOR.

COURT OF KING'S BENCH, Quebec, 20th October, 1819.

LARUE *vs.* CRAWFORD and others.

Held: That a contractor, for a public building, can maintain an action against the commissioners with whom he contracted for the erection of such building, if they have received from government the money which is due to them. (4)

PER CURIAM: Where a commissioner notoriously acts as an agent for government, his office excludes the presumption of

(1) Abbott, *on shipping*, 261.

(2) In this case, which was decided, on the 19th day of April, 1810, it was *held* that goods brought on freight, to be paid at Quebec, on delivery, cannot be removed from the wharf, before the freight is paid, and, if in good order, they are delivered when placed on the wharf.

(3) In this case, it was *held*, that, if a party moved for a jury, he cannot afterwards reject the verdict, on the ground that the jury ought not to have been allowed, because he, the mover, was not a merchant or a trader. It was said, *per Curiam*: This motion is an acknowledgement that his quality is within the meaning of the ordinance, 25 Geo. III, ch. II, § 9. V. art. 348 C. P. C.

(4) V. art. 1041 et 1715 C. C.

credit being given to him personally, and he is not liable for the contract into which he enters in his public capacity, although there be no other person against whom an action lies to enforce the contract, which he has entered into. (1) But, if he has received the money from government, which is to be paid to the person with whom he contracted, an action for money had and received, may be maintained. (2) In this case, it appears that the Defendants have received the money which Larue, who contracted with them, for erecting the gaol, at Gaspé, is to receive for the building he has erected, and no sufficient reasons have been offered to induce us to believe that it has not been fairly earned,

Judgment for the Plaintiff. (*Stuart's Rep.*, p. 141 et 2 *Rev. de L.*, p. 124.)

INJURES.—DOMMAGES.

COURT OF KING'S BENCH, Quebec, 20th October, 1819.

GOUDIE, against LANGLOIS.

Held: That an action of trespass, *d'injure*, cannot be maintained against an officer, who executes a writ issued upon a judgment rendered by an inferior court, in a matter over which they had jurisdiction. (3)

By the Provincial Statute, 45 George III, ch. XII, § 2, the Trinity house of Quebec, is authorized and empowered, *inter alia*, to make bye-laws "in respect to the boiling, or melting, " of pitch, tar, turpentine, or rosin, in the harbours, or on the " beaches of Quebec and Montreal, or *Cul-de-sac* of Quebec." Goudie, the Plaintiff in this action, boiled pitch, within the limits of the harbour of Quebec, contrary to the provisions of a bye-law of the Trinity house, of the 10th of June, 1818, enacted under the authority before stated; and, having been summoned to answer for the offence, upon an information fyled by Lambly, before the master and wardens of the Trinity house, and, after hearing, being convicted, a judgment for the penalty which the bye-law inflicted was rendered, and an execution against his goods and chattels, was issued, addressed, as usual, to the water bailiff of the Trinity house,

(1) *McBeath* vs. *Haldimand*, 1 T. R., 172; 5 Cochin, 756, 760; Paley, *Prin. and agent*, 296; 1 Comyn, *on contracts*, 272.

(2) *Rice* vs. *Everitt*, 1 East R., 583, in notis; 1 East, 135 and 579; Paley. *Pr. and agent*, 297; see also 1 T. R., 674.

See the cases of *Vondenvelden* vs. *Sewell*, attorney general, in K. B. Q. about the year 1799; *Scott* vs. *Lindsay*, ante, p. 146; *Goodenough* vs. *D'Estimauville*, K. B. Q., 1817, n° 425; *Hébert* vs. *Vallé*, Ib., n° 525; *Landry* vs. *Baillargé*, Ib., in 1819, n° 501.

(3) V. art. 1053 et 1715 C. C.

who levied the amount. The present action was, thereupon, instituted for the recovery of damages, against Langlois, for an alleged trespass in taking and selling the property of Goudie, and the defence was a plea of justification, founded upon the facts which have also been before stated.

PER CURIAM: The master and wardens of the Trinity house, undoubtedly, had jurisdiction over the subject matter of the information which was fyled, and, therefore, as they are not responsible to the Plaintiff for their proceedings, even if their judgment be erroneous (1), their officer who has legally executed a judgment, legal in itself, though erroneous, must necessarily be free from all responsibility on his part. In fact, in all such cases as the present in which damages are sought to be obtained from the officer who executes the writ, the want of jurisdiction in the court from which it issued, must be apparent upon the face of the writ itself, and, unless it be so, the officer cannot be considered as a trespasser. (2)

Judgment for the Defendant. (*Stuart's Rep.*, p. 142, et 2 *Rev. de L.*, p. 470.)

LEX LOCI CONTRACTUS.—PRESCRIPTION.

COURT OF KING'S BENCH, Quebec, 9th October, 1820.

HOGAN *vs.* WILSON.

Held: That the statute of limitations is a good plea, to a debt contracted in London, without reference, direct or indirect, to the law of another country. (3)

The Plaintiff demanded of the Defendant a sum lent in London, in the year 1795.

PER CURIAM: The debt, in this case, was contracted in England, without any reference, direct or indirect, to the law

(1) 10 Coke, 71, Hammond's N. P., 45.

(2) Buller's N. P., 82; Hawkin's P. C., liv. II, ch. XIII, § 10; 3 Leach's Ed., 175.

See a case in Burr. R., 1763, and Boucher's case in Cro. Jac., 81.

As to the liability of the officer where the inferior court has no jurisdiction, and of the Plaintiff where the court has jurisdiction, see 2 Wilson's *Rep.*, 384.

Held, in the United States, that an imprisonment, under a judgment of court, in not unlawful, if the court had general jurisdiction of the subject, although the judgment be erroneous. Ex parte Tobias Watkins, 3 Peters Rep., 201, cited in the "American Jurist," vol. IV, p. 360.

(3) V. art. 8 C. C.

of any other country. The law of England, therefore (1), is the standard of decision, and the statute of limitations must, of course, apply.

Action dismissed. (2) (*Stuart's Rep.*, p. 145.)

PETITORY ACTION.—POSSESSION OF THIRTY YEARS.

COURT OF KING'S BENCH, Quebec, 18th October, 1820.

The SEMINARY OF QUEBEC, against PATTERSON.

Held: That on proof of 30 years possession, the party is not bound to produce a title, or to offer any evidence, to shew that he held *animo domini*, or de *bonne foi*, until the contrary is proved by the Plaintiff. (3)

This was an action of revendication, brought by the Seminary against Patterson, to recover a piece of land, which had, as it was supposed, been granted by the *seigneur* of the fief of Beauport. The Seminary averred that it was within their *seigneurie*. In answer, however, to the action, the Defendant did not set up a title, by concession, from the Seminary, or from the seigniory of Beauport, but pleaded thirty years possession, and rested his defence entirely upon this exception.

(1) *Robinson* vs. *Bland*, 2 Burr., 1077; 1 *Black*, 234, 256; 1 Williams *Dig.*, 273.

(2) Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit prescriptionem apud nos in ejusmodi debitus receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi præscriptionem non esse receptam; proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfieldt* contra G. Y. iterum inter *Johannem Jonoliin*, sartorem principis Arausionensis, contra N. B. *utraque ante magnas ferias* 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causæ cognitione et sententia. Ratio hæc est, quod præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius, *lib.* I, tit. XII, def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci, in quo fit executio, non ubi res judicata est. Huberus, *De conflictu legum*, lib. I, tit. III, § 7.

A statute of limitations in a foreign country where the contract is made, has been held to be no bar in a suit brought on the contract in New York. *Nash* vs. *Tupper*, 1 Caines, 402; *Ruggles* vs. *Keeler*, 3 Johns *Rep.*, 263. The *lex loci* is held to apply only to the validity or interpretation of the contract, and not to the time, mode or extent of the remedy.

(3) V. art. 2242 C. C.

PER CURIAM: The Defendant, Patterson, has distinctly proved a public and uninterrupted possession of the land in question, by himself and by his predecessors, for a *period exceeding* thirty years; and, upon such evidence, in all cases of this kind, the law, from the length of time elapsed, presumes that the Defendant has possessed, "animo domini," and "de bonne foi," unless the contrary is proved *by the Plaintiff*, and does not require the Defendant to offer proof, on either of these points, or to produce a title of any description. The Seminary have not attempted to prove in this case, that Patterson has held the land under any circumstances which might shew that his possession was not "animo domini," or was "de mauvaise foi," and the action must, therefore, be dismissed. (1) (*Stuart's Rep.*, p. 146.)

INSURANCE.—POLICY.—CONTRACT.

COURT OF KING'S BENCH, Quebec, 20th October, 1821.

SCOTT, against the QUEBEC FIRE ASSURANCE COMPANY.

Held: That, policies of insurance are to be construed by the same rules as other instruments; therefore, where there is an express warranty, there is no room for implication of any kind. (2)

On the 21st day of August, 1820, the Plaintiff insured the sum of £2600, at the office of the Quebec Fire Assurance Company, upon a house which he inhabited, in Montreal, and, upon the goods and merchandize, furniture, plate, etc., which it contained, all of which were consumed by the fire, on the 15th day of August, 1821, while the policy was in full force. It was proved that the fire began in an adjoining house, and spread from thence to a wooden building, on the premises of the Plaintiff, from which it was communicated, through a doorway of the dwelling house, *which was open, although it had an iron door*, to the interior of the last mentioned edifice, and that it broke out between eight and nine o'clock in the evening. In the policy of insurance, it was stated "that the dwelling house of the assured was built of stone and covered with tin, gables through the roof and plafond, iron doors and shutters," and, for the Defendants, it was contended, that these words "iron shutters and doors" amounted in law to a warranty, which, according to the facts above stated, had not been performed.

(1) Grainville's *Arrêts;* Arrêt of 21st July, 1731, p. 385. This decision was affirmed in appeal, on the 20th January, 1823.

(2) V. art. 2490 2572, et 2578 C. C.

SEWELL, CH. J.: The rule, as to contracts in general, is, to give language its true effect, according to the intention of the speaker or writer, as inferred from the whole expressions, and the nature of the occasion to which they are applied. (1) And policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, certain words have acquired a peculiar sense, distinct from their ordinary and popular sense. (2) In this case, the description of the premises, which was furnished by the insured, is inserted in the policy, and, if, in point of fact, it be true, as it undoubtedly is, that they were "built of stone and covered with tin, had gables through the roof and plafond, iron doors and shutters," whether we consider these expressions in the policy as a *representation*, or as a "warranty," is immaterial. For, in either instance, the express contract of the assured has been *substantially* and *strictly* performed,(3) and, being an express contract, there is no room for implication, *expressum facit cessare tacitum*. The doors and windows being open in the middle of August, at half-past eight o'clock, is no proof of negligence.

Judgment for the Plaintiff. *(Stuart's Rep.*, p. 147, et 2 *Rev. de L.*, p. 76.)

MUR MITOYEN.

COURT OF KING'S BENCH, Quebec, 17th April, 1822.

LATOUCHE, against ROLLMAN.

Held: That an action for money paid and advanced, may be maintained, by a proprietor of a *mur mitoyen*, against his co-proprietor, for his proportion of the sum expended in the repairs of the wall, if the latter has impliedly acquiesced in the making of such repairs. (4)

(1) 1 Ev. Poth., 59, in notis.

(2) *Robertson* vs. *French*, 4 East. Rep., 130.

(3) 3 Selw., N. P., 881.

Note.—A warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words. Thus: there was a warranty that a ship should have 20 guns; and it appeared that she had, in truth, 22 guns, but only 25 men; which number is far short of the necessary complement for 20 guns. It was objected, that this warranty implied a competent number of men to work 20 guns, in case the ship should be attacked. But, it was determined that the warranty dit not include any thing not necessarily implied in it. Lord MANSFIELD said: "If a warranty be meant to mislead "it is a fraud, as much as a false representation. In this case there is no "ground to impute fraud, and therefore the Plaintiff is entitled to recover." *Hyde* vs. *Bruce*, B. R. Hil, 23 Geo. III, M. S., cited in Marshall, *on insurance*, p. 347, and in Phillips *on insurance*, p. 128.

(4) V. art. 520 C. C.

This action was for money laid out and expended. The Plaintiff and Defendant were joint proprietors of a *mur mitoyen*, party wall, between their respective dwelling houses, in the city of Quebec, which required repair. It did not appear in evidence that the Plaintiff had taken the usual steps of establishing, by *experts*, the necessity of the repairs which he proposed to make, and which, in fact, were necessary; nor was it in evidence that the Defendant had, at any time, objected to their being made. It was proved, on the other hand, that the Defendant had knowledge of the Plaintiff's intention to repair, before the work was commenced. That he daily saw the work, during its progress, without comment or prohibition, and, after it was finished, refused, on demand, to pay a moiety of the expense which had been incurred, but no express promise, on the part of the Defendant, to pay the amount of this moiety was proved.

PER CURIAM: A contract of mandate may be implied, from the conduct and acts of the parties, without any express declaration of their mutual intentions, and, therefore, according to Mr. Pothier's opinion, " when, with the knowledge, and, in the sight of another man, I perform, for him, any work and labor which he is bound to perform, the law raises, on his part, the *obligatio mandati contraria*, " by which, after the work is finished, he may be compelled to refund to me the sum of money which, in the prosecution of the work, I have disbursed and paid for him. (1) The present action is simply for money paid and advanced, and we see nothing to prevent the Plaintiff from obtaining judgment, for, although an *expertise*, to establish the necessity of the proposed repairs, is the usual course of proceeding, in such cases at the present, it is necessary only, in those instances in which the party Defendant demands an *expertise*, or is, either ignorant, or adverse, to any repair. (2)

Judgment for the Plaintiff. (*Stuart's Rep.*, p. 151, et 2 *Rev. de L.*, p. 207.)

(1) 2 Poth., *Mandat*, n° 29, p. 856, n° 180; *Ib.*, p. 923, n° 5, also p. 844; 2 Bourjon, p. 13, n° 10.

(2) *Ib.*, n° 9; 2 Poth., *Société*, 1er Append., n° 220, p. 615; *Peck* vs. *Wood*, 5 T. R., 130-133.

INSURANCE.—POLICY.—CONDITION.—EXPERTISSE.

COURT OF APPEALS, Quebec, 20th January, 1823.

On appeal from Montreal.

JOHN SCOTT and others, Appellants, and the PHŒNIX ASSURANCE COMPANY, Respondents.

Held : That under the clause, or condition, in policies of insurance, that, in case of any dispute, between the parties, it shall be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference, in the progress of the suit. (1)

This appeal arose out of an interlocutory order of the Court of King's Bench, at Montreal, in an action of covenant, upon a policy of insurance, by which that court assumed the power of compelling the parties to submit the matters in contest between them to arbitration, thereby enforcing the specific execution of a clause or condition in the policy of *insurance*, in the following terms : " In case any difference or dispute " shall arise between the assured and the company, touching " any loss or damage, such difference may be submitted to the " judgment and determination of arbitrators indifferently cho- " sen, whose award in writing shall be conclusive and binding " to all parties. "

BUCHANAN, for the Appellants :

In three distinct points of view, it would appear that the court below had acted unwarrantably, in referring the matters in issue between the parties to arbitrators : 1. that, considering the terms in which the condition was couched, it appeared, evidently, to have been the intention of the parties that the submission to arbitration should be dependent on the free will of the parties, but if the parties did submit, that the award to be made should be obligatory ; 2. that, even a submission to arbitration is a revocable instrument, and is assimilated to a power of attorney ; (2) *a fortiori*, an agreement to submit cannot bind irrevocably. And a party refusing *stare compromisso* could be made liable only to a penalty agreed upon, or to assessed damages. In accordance with which is the principle of the French law declaring that the courts cannot decree a specific performance, *nemo potest cogi præcisè ad factum* ; (3) 3. that the King cannot, by an agreement between any two or more of his subjects, be divested of his pre-

(1) V. art. 984, 989 et 990 C. C., et 341 C. P. C.

(2) Vignior's case, 8 Co. Rep., 163.

(3) Pothier, *Obl.*, n° 157.

rogative of judicial supremacy, the exercise of which he has delegated to his courts of justice. That those courts have accordingly always held that a mere agreement of persons to submit matters in dispute between them to arbitration cannot oust the courts of their jurisdiction, nor deprive the contracting parties of their right of resorting to the royal tribunals, for the adjustment of their controversies. (1) A doctrine favored by this court in *Pasteur & Mezieres*, (2) and by the Court of King's Bench, at Quebec, in *Racey* vs. *McCallum*.(3)

FLETCHER, on the same side, referred to the Roman law, as amended by *Justinian*. By the common law, no man in England is bound to submit to any tribunal but the King's courts; and, consequently, a legislative provision was thought necessary to enable the courts to enforce a submission to arbitrators, under a rule of reference, stat. 10 and 11., Will. III, and this statute has been construed strictly. (4)

T. GUGY, for the Respondents, contended, 1. That the laws of Canada must be resorted to in this case. That there is no similitude between the covenant in question, and a power of attorney. The maxim *nemo potest cogi præcisé ad factum* is misapplied, for *Pothier* (5) restricts it to cases in which the personal act of the covenantor is stipulated. As to the clause being in the potential mood, the court was bound to give effect to the clause. In legal parlance, the words *might* and *may* were equivalent to *shall*. The covenant is not contrary to the law of Canada. The contract of insurance is peculiarly inviolable, and the clause which it contains is not repugnant to the law of Canada before the conquest. (6) It was an ordinary clause in that contract, and one always enforced by the courts in France. (7) The powers and jurisdiction of the Court of King's Bench were established by the statute, 34th Geo. III, § 8, and include those of the superior council which were regulated by *édits et ordonnances*. 2. That the office of arbitrators in this case was like that of *experts*. (8) The court, therefore, was not despoiled of their cognizance of the cause, having still power to annul the award. An essential difference

(1) 2 Marshall, *on Ins. H.*, 679; *Kill* vs. *Hollister*, 1 Wils., 129; *Thompson* vs. *Charnock*, 8 T. R.

(2) Determined July, 1818.

(3) Determined in February, 1819.

(4) *Jenkins* vs. *Law*, 8 T. R., 87.

(5) Contrat de vente, n° 479.

(6) 3 Pothier, *Assurance*, n° 197.

(7) Ordon. de la Marine, 2 Valin 44-5, art. 70, p. 154; Conférence de l'Ord. de la Marine, etc., p. 251.

(8) Nouv. Den., *verbo* arbitrage, 239.

existed between this case and those cited by the counsel for the Appellants. In *Thompson* vs. *Charnock*, the question there to be referred was the construction of a charter party. The same, in 4, *Brown*. As to *Kill & Hollister*, it was not applicable, no plea having been made setting forth the covenant.

A. STUART, *pro iisdem :* The Appellant's counsel had argued as if the court had divested itself of jurisdiction, such was not the case. If the Defendant had asked the court to dismiss the action, the English cases might have been applicable. The arbitrators derive all their authority from the court, and the control of the court is evident through the whole course of proceeding. *May* is considered equivalent to *shall*, as "shall or may be lawful" in acts of parliament, otherwise the clause would be nugatory. Besides, all agreements must be compulsory. Submission to awards have always been favored by the legislature, in France and in England, and it is difficult to account for the pertinacity of the courts in opposing the designs of the legislators. This case is not governed by the law of England, but, conceding the contrary, in all cases, in England, the question arose upon the covenant being pleaded in bar of the action. As respects the law on the subject, in France, the ordinance *de la marine* is only declaratory of the common law before that period. (1) In the French courts, the judges had fees, and, consequently, legislative interference was necessary to compel them to send parties to arbitration. But, here, as the court receive no fees, they can have no interest in preventing references.

(SEWELL, CH. J : When a party refuses to name an arbitrator, whence have the courts derived a power to nominate, instead of the party refusing ?)

The rule *nemo potest cogi præcisè ad factum* cannot be applied. In England, no specific performance of a contract of sale can be decreed, but the chancery can say that their judgment shall be equivalent, so here, an engagement to refer to arbitrations. No man can set up his own wrong. Covenant to submit implies every thing accessary and necessary to accomplish the intentions of the party. A man asking relief will have relief, according to his covenant. But the contract of assurance stands singular, and is not like contracts *juris gentium*, but entirely arising out of municipal, arbitrary, and positive law, and the agreement of the parties. In such a contract, a deviation, in one particular, destroys the whole. Contracts *juris gentium*

(1) 1 Pigeau, 246 ; 1 Jousse, Ord. of 1667, tit. XIV, art. 7 ; Rép. de Jur. *verbo* arbitrage, 553, n° 3 ; Poth., *Proc. civ.*, ch. IV, p. II, art. 2 ; Dict. de Royer, *art.* arbitrage forcé, p. 168, 170 ; 2 Valin, *Ord. de la Marine*, 154,

are carried into effect *per æquipollens*, in assurance, no such execution is used, and specific performance must be had.

SEWELL, CH. J.: The laws of England and of France correspond on the question. The court is of opinion that there has been an assumption of authority by the court below. Courts of justice, in deciding questions, must derive their authority from the law, or from the consent of the parties. In this case, there is no such derivation of authority to the court below, and, on that principle, their judgment is reversed. The word *may* is distinct from *shall*, the one imperative, and the other permissive. Words of common parlance are not to be construed as legal phraseology. The courts, in such case, interpret language as any common person would do, with relation to legal acceptation. No specific performance of a contract can be compelled. (1) How could a court of equitable jurisdiction have compelled specific performance? It proceeds by imprisonment to compel performance. (2) The court did not so proceed in this case. It did not proceed to compel the party to name, but assumed the power of nominating in his stead: and can this be called a specific performance, where the court, instead of obliging the parties to name, has taken upon itself to do so? In chancery, the court extends the contract beyond the agreement of the parties. *Jordan* vs. *Sawkins*, (3) and *Tattersell* vs. *Groote* (4) are cases perfectly parallel to the present, and they are supported by the law of France. (5) Submission must be always voluntary. (6) Nobody but the parties can name *arbitres*, (7) and it is the duty of the courts to retain the administration of the laws, (8) so that there is a perfect anology between the law of England and the law of France. It might have been a question whether this case should not be governed by the law of England.

Judgment reversed. (*Stuart's Rep.*, p. 152.)

The case was taken to the Privy Council, and, hereafter, follows their judgment.

(1) Poth., *Obl.*, 157,

(2) 4 Bro., Ch. 477.

(3) 4 Bro. Ch., 477.

(4) 2 B. & P., 131.

(5) Dic. de Dr., *arbitres*, Charondas; Brillon, *arbitre*, n° 33; 1 Henrys, 439.

(6) Guy Pape, *Quest.* 185.

(7) Nouv. Den., *verbo* compromis, n° 2; Charondas, liv. IV; Lacombe, *compromis*, n° 1.

(8) Bos. and Pull, 131; *Street* vs. *Rigby*, 6 Ves. jun., 817.

APPEAL.—ASSURANCE.—CONDITION.

PRIVY COUNCIL OF HIS MAJESTY, London, 13th May, 1829.

JOHN SCOTT, and another, Appellants, and the PHŒNIX ASSURANCE COMPANY, Respondents.

Held : That the Court of Appeals may hear an objection not argued in the court of original jurisdiction. If a condition referred to, in a policy of insurance against fire, requires, in the event of loss, and before payment thereof, a certificate to be procured, under the hand of a magistrate or sworn notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know, or verily believe, that they have really and, by misfortune, without fraud, sustained, by fire, loss and damage, to the amount therein mentioned, such certificate is a condition precedent to a recovery of any loss, against the insurers, on the policy. And, if a certificate be procured, in which a knowledge and belief, as to the amount of loss, is omitted, it will be insufficient.

The VICE-CHANCELLOR: Their Lordships will not trouble the counsel for the Respondents in this cause. There appears only to be, in fact, two questions ; and the first question that has been made is, whether it was competent to the Court of Appeals of Lower Canada to hear an objection which was not argued in the court of original jurisdiction. Now, taking it for granted, the objection was not argued in the court below, there is no rule of law which prevents a person appealing from arguing a question which was never argued in the court below. It is the constant practice of the court above, though they often do refuse to hear arguments that were not argued in the court below ; and it is observable that the very case which has been brought into discussion, furnishes an instance of the right of the parties to use before the Court of Appeals arguments which were not used in the court below ; for, in the case of *Wood* vs. *Worsley*, (1) lord *Kenyon* commences his judgment, having referred to the point of a *venire de novo*, in these words : " The second point respecting the *venire de novo* is now for the first time started, no notice having been taken of it on the first argument here, or on the motion to arrest the judgment, in the Court of Common Pleas ; if there appeared to be any ground for it, we would desire to have the case further investigated, " and so on.

Then with respect to the principal question, it appears to Their Lordships, this case is governed by the case of *Oldham* vs. *Bewicke*, and *Wood* vs. *Worsley*.(1) The only difference between the two cases is this, that by the certificate in the present case, the parties certifying were to certify to their knowledge or

(1) 2 H. Black, R., 574 and 577, in note.

belief, that a loss had been sustained to the amount therein mentioned, manifestly implying that their certificate itself was a certificate of the amount of the loss according to the knowledge and belief of the certifier. Now, here, no amount whatever is stated, and it is of as much importance to the company to have the knowledge and belief, and getting persons pledged to the amount of the loss, as it is of importance to them to have persons giving that pledge as to the character of the parties; and the principle, therefore, of these two cases, appears to Their Lordships so completely to govern the present case, that they think the judgment below must be affirmed. It is observable, from the judgment, in *Oldham* vs. *Bewicke*, that it was a case where the objection to the certificate appeared upon the face of the declaration, and the Defendants below not having taken advantage of the condition precedent, the Plaintiff had recovered a verdict, an application was made to the court to set aside the verdict; and lord *Loughborough* said: "Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the bankrupt had not sustained all the loss he claimed; yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case." In this case Their Lordships think there was an absolute defect of title, of which advantage may be taken in the way it has been, by arguing the objection in the provincial Court of Appeals for the first time, and therefore the judgment of the court below must be affirmed.

Mr. BROUGHAM: Your Lordships affirm the judgment with costs?

The VICE-CHANCELLOR: Yes; I intend to give costs.

(*Stuart's Rep.*, p. 354.)

JURISDICTION.—VICE-ADMIRALTY.

COURT OF VICE-ADMIRALTY, Quebec, 26th June, 1823.

HOWARD, against the ship CAMILLUS.

Held: That the Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. (1)

KERR, J.: This is a suit brought by the master and owner of the scow *Hazard* against the ship *Camillus*, and the Libellant complains of an injury done to the *Hazard*, on the river St. Lawrence, near the city of Quebec, by the people of

(1) V. art. 28 C. P. C.

the ship *Camillus*, who when she was under a press of sail, so carelessly navigated her, that she ran across the bows of the *Hazard*, whereby she sustained damage to the amount of £200. To this libel, a declinatory exception has been pleaded, in which it is averred that the *locus in quo* of the pretended injury is within the body of the county of Quebec, and solely cognizable by the Court of King's Bench for for the district of Quebec.

The case of the ship *Trio*, in which, some years ago, a prohibition issued to this court, under circumstances similar to the present, (1) has induced Mr. Jones, the claimant, to consider that the question of jurisdiction, over the river St. Lawrence, has been put to rest. But no appeal was instituted in that case, nor was, even, the Admiralty heard, at all, in support of its jurisdiction, and, unless a question of such great importance, by which an extent of four hundred and sixty miles of sea is transferred from the Admiralty to the courts of common law, by the decision of a tribunal in the last resort, I cannot admit that the question can be settled. It is only before the High Court of Admiralty, or before His Majesty in council, where the matter can properly and finally be decided.

During the time of the French, a Court of Admiralty was established at Quebec, vested with powers more extensive than that of the Court of Vice-Admiralty, and, in a maritime sense, the river St. Lawrence was then considered as part of the *altum mare*, for the *Ordonnances de la Marine* thus define what shall be considered as the sea, " sera réputé bord et rivage de la mer, tout ce qu'elle couvre et découvre, pendant les nouvelles et pleines lunes, et jusque où le grand flot de mars se peut étendre, sur les grèves." The maritime parts of *New France*, perhaps, extended further than are now claimed by this court, sitting under an English admiralty commission, for, by it, the jurisdiction of the Court of Vice-Admiralty extends to a cognizance of " every matter, cause or thing, " business, or injury whatsoever, done or to be done, as well, " in, upon, or by the sea, or public streams, fresh waters, ports, " rivers, creeks and places overflowed whatsoever, within the " ebbing and flowing of the sea, or high water mark, as, upon " any of the shores or banks adjoining to them." These are the words of the commission granted by the High Court of Almiralty to the judge of the Court of Vice-Admiralty, in the year 1763, soon after the establishment of the civil government, in the then province of Quebec, and, such are the terms of the same commission, granted so late as the year 1797, to the present judge ; so that it may be asked by what ordinance

(1) Cette cause est rapportée à la page 115 de ce volume.

or statute, British or colonial, is the jurisdiction over the river St. Lawrence, as far as the flux and reflux of the tide is visible, taken away from the Admiralty, and given to the colonial Court of King's Bench? It has been said that the royal proclamation of the year 1763, has taken away the jurisdiction, over the river St. Lawrence, from the Admiralty, and given it to the common law courts. But, it cannot escape observation that this proclamation (if a royal proclamation could, in law, deprive the Admiralty of its ancient jurisdiction), was not intended to settle and adjust the local boundaries of the common law and Admiralty courts, then about to be established. Its only intention was to designate the limits of the newly acquired province of Quebec, so as to shew what portion of that territory should be placed under the care and inspection of the governor of Quebec. Nor was the proclamation of Sir *Alured Clarke*, of the year 1792, with reference to the act, 31st Geo. III, ch. XXXI, conducive to the end for which it has been cited, considering its avowed purpose was to subdivide the province of Lower Canada, into counties, so as to guide the inhabitants in the exercise of their right of suffrage for members to the Assembly, under the new constitution given to them by that act. If the jurisdiction of the High Court of Admiralty, over this great arm of the sea, could be taken away by inference (which I deny), no such inference can be fairly drawn from these public acts. The river St. Lawrence has been assimilated to the Thames, and, Quebec to London, in order to sustain the position that the river, near Quebec, is *infra corpus comitatus*. But, why assimilate this river more to the Thames than to the Bristol channel, to which it bears a much stronger resemblance, or to the mouths of the Tyne, the Mersey, or the Dee, all of which are æstuaries of the sea; or to the Firth of Forth, which is exclusively within the jurisdiction of the High Court of Admiralty of Scotland? The bason of Quebec has not, beyond the memory of man, as the Thames, been subject to the courts of common law, and, indeed, these courts have not themselves yet existed thirty years; nor, can the bason, near the city, be strictly holden to be a port, the definition of which is, "locus conclu-"sus, quo importantur merces et exportantur," for, the river is not there shut up, but flows ninety miles above it, and is actually navigable for one hundred and eighty miles.

If the Court of Vice-Admiralty have no jurisdiction in this suit, for an injury done on the waters of the St. Lawrence, the commission granted to this court is nugatory, *vana est potentia quæ non in actum venit*, and, if so, where is this Libellant to seek for redress? It is clear that it cannot be found in the Court of King's Bench, where the remedy lies

only *in personam*, not *in rem*, and, if the suit cannot there be entertained against the ship itself, no adequate relief can be had in that court.

The Courts of King's Bench exercise their fonctions under the Provincial Statute, 34 Geo. III, ch. VI, by the 2nd clause of which, and, that is the foundation of all their authority, it is provided, " that the said courts, in their respective districts aforesaid, shall have original jurisdiction, to take cognizance of, hear, try and determine, in the manner hereinafter enacted, all causes, as well civil as criminal, and where the King is party, except those purely of Admiralty jurisdiction." The words *except those purely of Admiralty jurisdiction*, must mean something, and, if they import any thing, they must mean that these common law courts are prohibited from taking cognizance of " any matter, cause, or thing, business or injury whatsoever, done or to be dóne upon the sea or public streams, fresh waters, ports, river, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea," provided, as, in this case, the proceedings are against the thing in specie.

After giving this case every consideration due to the importance of the question proposed, I have no hesitation in pronouncing a decree maintaining the ancient jurisdiction of the Admiralty, over the river St. Lawrence, and dismissing this exception, with costs.

Declinatory exception dismissed. (1) *(Stuart's Rep.*, p. 158.*)*

JURISDICTION.—VICE-ADMIRALTY.

COURT OF VICE-ADMIRALTY, Quebec, 11th August, 1823.

WILSON, against NORRIS.

Held: That, under the words "court of session, having jurisdiction in " the port or place at which a ship shall arrive," contained in the 57 Geo. III, ch. x, § 8, the Court of Vice-Admiralty claims jurisdiction in proceedings for penalties and forfeitures under that act. (2)

Judge KERR: This information has been preferred against William Norris, master of the brigantine "William," of Dublin, for penalties to the amount of £2500, for having taken, from the port of Dublin and brought to Quebec, fifty passengers

(1) The Court of King's Bench awarded a prohibition to the Vice-Admiralty, in this suit, upon a suggestion stating that the injury happened in the river St. Lawrence, and in the body of the district of Quebec.

(2) V. art. 28 C. P. C; *Hamilton et al.*. vs, *Fraser et al*, *ante*, p. 115 et *Howard* vs, *The ship Camillus*, p. 189.

more than are permitted by law to be carried in the said brigantine, in contravention of the 57th of His late Majesty, ch. x. (1)

I am free to confess, that, in granting process against the Defendant, I had some doubts as to the jurisdiction of this court over the offence alleged to have been committed; and, to this point, I was desirous of hearing the Defendant by counsel; but, Mr. Norris, though personally served with a citation, has not thought proper to appear in any stage of the proceedings: and the court must, in this matter, be entirely guided by its own judgment, assisted by such lights as have been cast upon it by the advocate of the informant.

The statute declares that the penalties and forfeitures to be incurred under that act, shall and may be recovered, "in a "summary way, in any court or courts of session having "jurisdiction in the port or place at which such vessel shall "arrive." If no former statute had granted to this court a right to entertain prosecutions for penalties and forfeitures, under the trade and revenue laws, I should have felt much doubt whether the words "court or courts of session," in the statute, gave any jurisdiction, in these matters, to the Courts of Vice-Admiralty. But, the 49th of His late Majesty, ch. CVII, (2) in most express terms, gives to the Vice-Admiralty Courts, cognizance in such cases; for, it provides, by the first section, "that all such penalties and forfeitures" (speaking of such penalties and forfeitures as relate to the trade and revenue of the colonies), "which may have been heretofore, or "may be hereafter incurred, shall, and may be prosecuted, "sued for, and recovered, in any court of record, or of Vice-"Admiralty, having jurisdiction in the colony or plantation "where the cause of prosecution arises."

In this view of the question, the court is not unsupported in its claim to a concurrent jurisdiction with other courts, in all prosecutions for penalties and forfeitures, under the trade and revenue laws, by a distinct legislative enactment, providing against past and future violations of them; and, I am, necessarily, led to this conclusion, that, by the words *court or courts of session*, this court is included.

The trite maxim, *est judicis ampliare jurisdictionem*, which is to be applied with great caution, may, in truth and justice, be called in aid of this construction of these words; for, if this court have no jurisdiction over the penalties in the 57th of George III, then the provisions of it will become nugatory, there being no other court which has jurisdiction

(1) Ce statut est abrogé par 31 et 32 Vict., ch. XLV, s. 71.

(2) Ce statut a été abrogé par le statut de 1825, 6 Geo. IV, ch. CV, s. 273.

over the port of Quebec *in session* at this time, nor will any other but the Court of Vice-Admiralty meet before the 21st September, and, before that time, the Defendant may leave this province, all witnesses may disperse; and, thus, the provisions of the act will be eluded.

The question then is resolvable in a short enquiry of fact, whether the Defendant has incurred all or any of the fifty penalties for which the informant proceeds in demand in his libel; and, after reading over the evidence taken in support of it, I must say that it exhibits a case of as lawless behaviour and moral turpitude as is rarely disclosed in a court of justice.

Though it appears from the witnesses that the passengers far exceeded the number restricted by the statute, which is "*one* "*adult person, or three children under 14 years of age, for* "*every one ton and a half of that part of the ship, or vessel, remai-* "*ning unladen.*" Yet, they all differ as to the precise number, which is not to be wondered at, considering the crowded state of the ship. However, the testimony of Mr. Fife, the custom house officer, who boarded the brig, on her arrival, and who counted the passengers, in the presence of Clifford, the other witness, enable the court to say with correctness that there were, exclusive of the crew, ninety seven grown persons, and forty four children, that were brought from Dublin, in the brigantine "William," a vessel of only ninety three tons burthen. Mr. Fife states that the ship was so filthy, and the smell, between decks, so offensive, that he did not venture to go below.

These are the facts which this Informant discloses, and, certainly, the case is a deplorable one. It is in vain that the civilized nations unite to abolish the slave trade, and to mitigate the miseries of mankind, if, from the vile passion of avarice, which is *semper infinita, insatiabilis*, a traffic like this is permitted, with impunity, to be carried on between our shores, by which numbers of our fellow-subjects are taken hoodwinked from their homes, and consigned to miseries which can be compared only to those of the black hole of Calcutta. Happily, in this instance, the mortality was not great, considering the crowded state of the ship; but, had the weather been warm, and the winds less favorable, I do not think that one of the number would have lived to tell the tale of their sufferings.

Following the dictates of my heart and understanding, I find the fact and the law with the Informant, and, the facts being proved, the law points with unerring hand to this conclusion, that the penalties for the recovery of which the Informant proceeds in demand, have been incurred, and I decree that the sum of £2500, sterling, be paid by the

Defendant, William Norris, one moiety to His Majesty, and the other moiety to the Informant. (1) (*Stuart's Rep.*, p. 163.)

MANDAMUS.—INJUNCTION.—SHERIFF.

COURT OF KING'S BENCH, Quebec, 12th April, and 19th June, 1824.

Ex parte, upon the petition of SAMUEL NEILSON, for a writ of injunction and a mandamus.

Held: That the court will not grant a *mandamus* to the sheriff, to cause the sale of lands and tenements, as directed by the ordinance 25th Geo. III, ch. XXXIII, to be advertized in a newspaper intituled *The Quebec Gazette*, where it is not shewn that there is no other specific legal remedy.

Nor will the court grant an injunction to the King's printer, enjoining him not to advertize the sale of lands and tenements, under the same ordinance. (2)

In the year 1764, William Brown and Thomas Gilmore established, in Quebec, with their own funds, on the assurance of a list of subscribers previously obtained, a newspaper intituled *The Quebec Gazette.* Brown subsequently purchased Gilmore's share of the establishment, and, afterwards, was appointed King's printer, with a salary. After his death, the establishment was purchased by his nephew, Samuel Neilson, who continued the newspaper, without, however, any commission, and left it, by his will, to his brother John Neilson. On the first day of May, 1822. John Neilson sold his printing establishment, and his right to the *Gazette* to his son, Samuel Neilson and William Cowan. On the third day of July, 1822, Samuel Neilson obtained a commission, as King's printer, and he continued to print the paper, for his benefit, and that of William Cowan, his partner, in the printing establishment, Subsequently to the establishment of this newspaper, and, during its publication, various ordinances and laws were passed, in this province, requiring certain public advertisements to be inserted in the *Quebec Gazette*, but, particularly, the ordinance 25th Geo. III, ch. II, § 33, which is as follows. (*Cette section est reproduite textuellement à la p. 68 de ce volume.*) From the time when this newspaper was established, the notices, required by law to be published in the *Quebec Gazette*, were in fact

(1) An action having been subsequently instituted in the Court of King's Bench, upon the above decree, judgment was rendered, on the 16th day of October, 1823, dismissing the action, upon the ground that the Court of Vice-Admiralty had no jurisdiction in such cases.

(2) V. art. 648, 1022 et 1033 *a* C. P. C.

published therein, at prices agreed upon with the executive government, except when diminutions of such prices were voluntarily made by the proprietors. On the 30th day of October, 1823, John Charlton Fisher, of the city of Quebec, doctor of laws, there printed and published another public newspaper, styled *The Quebec Gazette*, and advertised therein the sales of lands and tenements, as required by the above recited ordinance to be inserted in the *Quebec Gazette*.

SEWELL, Ch. J.: We have before us a motion, on the part of Samuel Neilson, for a writ of *mandamus*, directed to the sheriff of the district, commanding him to cause to be printed in a newspaper, which is printed and published by Samuel Neilson, under the title of *The Quebec Gazette*, all advertizements required to be published in the execution of his office, when lands and tenements are seized to be sold by décret. This motion is founded upon affidavits made by John and Samuel Neilson. It is stated that, during the whole of the time, since the establishment of the aforementioned newspaper, the advertizements required by the ordinance, 25 Geo. III, ch. II, § 33, to be published in the *Quebec Gazette*, when lands and tenements are taken in execution by the sheriff, were published in the paper printed under that title by Samuel Neilson and his predecessors. The inference drawn by the Applicant, Samuel Neilson, from the facts stated is this, that, by a just construction of the ordinance in his favor, the sheriff oughtto be restrained from publishing his advertizements of sales by décret in another paper, which is also intituled *The Quebec Gazette* and is published under the authority of the Crown, by His Majesty's printer, and the *mandamus* is asked to restore him to the right of printing all such advertizements, upon the ground that title to the *Quebec Gazette*, originally printed by Brown and Gilmore, is vested in the Applicant, and that the ordinance directs the sheriff's advertizements of sales by décret to be inserted in the *Quebec Gazette*.

The writ of *mandamus* is a prerogative writ, to which the subject is entitled, upon a proper case shewn, to the satisfaction of the court. The object of this writ is to prevent disorder from a failure of justice, and it is used where the law has established no specific remedy, and when, in justice and good government, there ought to be one. (1) There is, however, a great deal of difference between a *mandamus* to admit, and a *mandamus* to restore, the former is granted merely to enable the party to try his right, as he would, otherwise, be left without any legal remedy. But, the courts have always looked moore strictly to the right of the party applying for a

(1) *Rex* vs. *Barker*, 3 Burr., 1265.

mandamus to be restored. In these cases, he must, not only, shew that there is no other specific legal remedy. He must also shew a *prima facie* title in himself to the right which he claims, by laying before the court such facts as will warrant them in presuming that the right is in him. (1) Lord Mansfield has expressed the rule in this respect in very few words, in the case of *The King* vs. *the Bank of England*, " Where an action", says His Lordship, " will lie, for complete " satisfaction, equivalent to a specific relief, and the right of " the party applying is not clear, the court will not interpose " the extraordinary remedy of a *mandamus*." (2)

How can the right of the party applying in this case be said, from the facts laid before us, to be clear, when he has, himself, impeached that right, by accepting and acting, in the exercise of it, under a commission from the Crown, appointing him to be printer to the King; when it is not sworn, in any of the affidavits, that the original printers of the paper were not in the service and pay of the Crown, as printers to the King, when the ordinance was passed upon which he founds his right, and it is sworn that the prices paid, for printing the sheriff's advertizements, have, at all times, been settled by agreement, not with that officer, but with the executive government; when it is not sworn that any right or title to Brown and Gilmore's *Quebec Gazette*, was ever vested, by any transfer of any description, in Samuel, the brother of John Neilson, from whom he derives his own right and title, by the will of Samuel, and the assignment of John, it being sworn that Samuel purchased the establishment, and no more?

Or, can we presume the right to be vested in him, when, from the deposition of John Neilson, it is apparent that the right, if any there be, is vested in him and one William Cowan jointly.

Upon the ground, therefore, that the party applying for the *mandamus* has not laid, before the court, such facts, as will warrant us in presuming that the right claimed is in him: and, upon the further ground that he can try his right, if he has been legally dispossessed of it, without colour of title, by an action for money had and received, for the profits, (3) or by an information, in the nature of a *quo warranto*, if what he claims is to be considered as a right to execute an office, and any other person is in possession of it, with an apparent title, (4) which, of itself, is a decisive answer to the present application for a *mandamus*.

(1) *The King* vs. *Jotham*, 3 T. R., 575; *The King* vs. *the Archbishop of Canterbury*, 8 East., 219.

(2) Douglas, 526.

(3) *Rex* vs. *Jotham*, 3 T. R., 575.

(4) *Rex* vs. *the Mayor of Colchester*, 2 T. R., 259.

A motion has also been made, in this cause, for an injunction, commanding and enjoining John Charlton Fisher, his servants, workman and agents to desist from printing and publishing, in the *Quebec Gazette* (a paper purporting to be printed by him, as printer to the King), the advertizements by law required to be published in the *Quebec Gazette*, when lands and tenements are seized by the sheriff, under writs of execution; and the same affidavits are offered, in support of this motion, for an injunction, as are offered in support of the motion for a writ of *mandamus*. But, admitting that, by law, the advertizements of sheriff's sales must, necessarily, be inserted in the *Quebec Gazette*, printed by Samuel Neilson, will it follow that John Charlton Fisher has not a right to insert the same advertizements in the King's Gazette, if he see fit to do so? It is plain that there is no ground whatever for the injunction which has been asked.

It is ordered, therefore, that Samuel Neilson take nothing by his petition for a *mandamus*, or by his motion for an injunction. *(Stuart's Rep.*, p. 168.*)*

INSURANCE.

COURT OF KING'S BENCH, Quebec, 20th June, 1824.

PEDDIE, against the QUEBEC FIRE INSURANCE COMPANY.

Held: That, in insurance against fire, the insurers pay the whole of any loss which does not exceed the amount insured, although the goods insured be of greater value. (1)

This was a case upon a policy of insurance against fire. The Plaintiff insured the sum of £350, upon his furniture, which was admitted to be of the value of £722. By fire, so much of his property was consumed as amounted to £490, and this action was brought to recover the entire sum of £350, which the Plaintiff had insured. The Defendants paid into court £238 19s ½d, as a sum which bore the same proportion to the amount of the loss, that the sum insured bore to the whole value of the furniture insured, and contended that they were not answerable for the same.

The unanimous opinion of the court was delivered by the CHIEF JUSTICE, as follows:

The rule, as to the construction of contracts in general is to give to language its true effect, according to the intention of the speaker or writer, as inferred from the whole expressions, and the nature of the occasion to which they are applied: and

(1) V. art. 2582 C. C.

policies of insurance are to be construed by the same rule, unless, by the known usage of trade, or the like, particular words or particular expressions have acquired a peculiar meaning and import, distinct from their ordinary and popular sense. The policy of the Quebec Fire Insurance Company commences in the following words, viz. : " This policy witnes- " seth that A. B. (the person insured) has paid into the office " a sum certain, in consideration that he, the person insured, " in the event of any loss or damage by fire, upon the pro- " perty in the policy particularized, named and described, in " the place or places herein set forth, and, not elsewhere, shall " have a claim not exceeding the sum or sums insured, " and this is followed by a specific engagement and covenant, on the part of the company, in consideration of the premium so paid, which is in the following words, viz. " The Quebec Fire " Insurance Company do hereby promise to pay, make good, " reinstate, and satisfy, unto the said insured, his heirs, etc., " all such damages, or loss, as shall happen by fire to the " property described, not exceeding the sum insured. " From these extracts, it appears, giving to the language used its true effect, that the premium of insurance is paid by the insured, in consideration that he shall have a claim, in the event of any loss, or damages, occasioned by fire to the property described in the policy, and that the insurers undertake to pay and make good all such damage, or loss, as shall happen by fire to the property insured, within the value of the sum insured; yet, it is contended, in this case, that the insurers are liable to make good a part only of the sum insured, notwithstanding the amount of the loss and damage actually sustained upon the property insured, is more than the amount of the sum insured; that a certain proportion only of the value of that property was insured and, consequently, that the claim of the Plaintiff, for the loss and damage he has sustained, must be calculated, with reference to the whole value of the property upon which he insured, and most bear the same proportion to the amount of the whole loss, that the whole loss bears to the whole value of the property insured. It is a strong conclusion against this pretension that there is no instance of a similar demand to be found in the books, in any case of insurance against fire. The construction contended for might perhaps obtain, if an insurance against fire was held in law to be merely an insurance of things *in se*, to which the policy refers; for, in such case, if £500 was insured generally, against fire, upon a library of 1000 volumes, each being of the value of 20s, the insurance would necessarily apply equally to every volume, and consequently, every volume being insured for one half only of its value, the loss of

500 volumes by fire would render the insurers liable for the sum of £250 only.

But, in point of fact, an insurance against fire is held, in law, to be a contract of personal indemnity, by which the insurer undertakes to *guarantee the person insured*, against all loss and damage which he may sustain by fire, upon the property insured, to the amount of the sum insured. There is certainly a great dearth of authorities and cases upon the contract of insurance against fire, but there are enough to establish this point. By the contract of insurance against fire, says the late Mr. Serjeant Marshall, in his *Treatise on insurance*, (1) the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to *indemnify the insured*, against any loss, or damage, which he may sustain, in his houses, goods or marchandize, by fire, during a limited period of time. A policy of insurance, says the lord chancellor King, in the case of *Lynch* vs. *Dalzell*, (2) is, merely, a special agreement, with the person insuring, that the insurer *indemnify* him, against such loss, or damage, as he may sustain by fire. But, the language of lord *Hardwicke*, in the case of the *Saddler's Company* vs. *Badcock*, (3) is the most in point. The society of the Hand in Hand office (says His Lordship), are to make satisfaction, in case of any loss by fire. But, to whom, and for what loss are they to make satisfaction ? Why, to the person insured and for the loss he may have sustained. It cannot properly be called insuring the thing, for there is no possibility of doing it, and, therefore, it *must mean insuring the person from damages.*

The writers upon our own law have scarcely touched upon the contract of insurance *against* fire, but, as far as they have gone, they perfectly coincide with the opinions expressed in the authorities which have been cited. This will be seen, upon reference to *Le Camus' Denizart, verbo* assurance, (4) and Pothier's *Contrat d'assurance.* (5)

Upon the whole, we are of opinion that the Plaintiff is entitled to recover from the Defendants in this action, the whole amount of the loss and damages which he has sustained by fire, according to the declaration And the judgment of the court, therefore, is for the Plaintiff. (*Stuart's Rep.*, p. 174.)

(1) Vol. II, 784. (2) 4 Brown P. C., 435. Tomlin's edit. (3) 2d Atkins, 554.

(4) Sec. 1, n° 1. (5) n°s 2, 3, 4.

In insurance against fire, the insurers usually stipulate, in the policy, to pay the whole of the loss which does not exceed the amount insured; that is, if one thousand dollars be insured on furniture, goods, or a house, worth two thousand dollars, and damage happen by fire to the amount of one thousand dollars, the insurer pays for the whole damage; whereas, according to the principles of adjusting a partial loss, under a marine policy, he would pay for but half of it.—Phillips, *on insurance*, p. 375, *in notis.*

PROCEDURE.—COLLECTOR OF CUSTOMS.—NOTICE OF ACTION.

COURT OF KING'S BENCH, Quebec, 6th September, 1824.

WILLIAM PRICE, against MICHAEL HENRY PERCEVAL.

Held: That, in an action against a collector of the customs, to recover back money exacted by him as fees of office, he is not entitled to one month's notice of action. (1)

Nor can he object that such action should have been commenced within three months from the time when such fees were paid.

This case was called for the adduction of evidence before the Chief Justice and Kerr, justice, when Black, of counsel for the Plaintiff, called upon the Defendant to produce various documents, pursuant to notice:

The ADVOCATE GENERAL and PRIMROSE, for the Defendant, objected that, as it appeared by the bill of particulars, the action was brought to recover back sums of money demanded and received by the Defendant from the Plaintiff, as fees of office due and payable to the Defendant, as collector of His Majesty's customs at this port; and that the sums of money, so sought to be recovered back, were stated to have been received by the Defendant, between the fifth of May, and the eighteenth of November, 1823, both days inclusive: 1. No evidence could be received, until the Plaintiff had proved one month's notice of action, under the statutes, 23rd Geo. III, ch. LXX; 24th Geo. III, sec. 2, ch. XLVII; and 28th Geo. III, ch. XXXVII. (2) 2. That, under the provisions of these statutes, the action should have been commenced within three months, next after the matter or thing done. The action was brought to recover back money, either wilfully or inadvertently taken by the Defendant, as fees of office, and being brought against him as a custom house officer, for an act done by him *colore officii*, or by reason of his office, he was clearly within the provisions of

(1) V. art. 22 C. P. C.

(2) La sec. 25 du ch. XXXVII des Statuts impériaux de 1788, 28 Geo. III, contient la déposition suivante:

"No writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order, in his or their aid, for any thing done in the executioner by reason of this or any other act or acts of parliament now in force or hereafter to be made, relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode, by the attorney or agent for the person or persons who intends or intend to sue out such writ or process as aforesaid; in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent."

the statutes in question. The act was not merely intended to protect persons acting within the strict line of their duty, but to protect them from the consequences of any excess, inadvertently committed in the exercise of their office. The fees of the officers of the customs were established by various acts of the Imperial Parliament, and, having such legal foundation, formed a part of the office to which they belonged. This action was not merely for a non-feasance, but for a misfeasance, in taking more than the Defendant was entitled to, for it was admitted that he was entitled to some fees; upon the whole, it was contended, that, although these formal objections might be considered as evincing a disposition, on the part of their client, to evade the main question, they felt themselves bound by professional duty to take them; and, moreover, they were supported by the case of *Greenway* vs. *Hurd*, (1) where, in an action brought against an excise officer, to recover back duties paid after the act of parliament imposing them had expired, such notice was held necessary. They also cited *Saunders* vs. *Saunders* (2), and concluded by stating that as they considered these preliminary objections decisive in their favor, they desired that they might be disposed of before proceeding to the examination of the witnesses; for, the act of parliament peremptorily enacted, that no evidence whatever could be received, until such notice should have been proved. The court, therefore, were bound to give their opinion, *in limine*, whether or not the Defendant was within the protection of these acts of parliament.

BLACK, for the Plaintiff, said that the acts in question did not afford the Defendant the protection which he claimed. The public interest required that officers of customs and excise should be protected in the discharge of their duties, for all acts by them done *bonâ fide*, for the enforcement of the laws of customs and excise; even when, according to the strictness of the common law, they would be liable to damages. Without such protection, it was obvious that frauds on the public revenue might be committed in various forms with impunity. But this protection was conferred upon them, not for their individual benefit, but for the purpose of securing the full and just execution of the laws of trade, shipping and revenue. No such consideration of public policy can apply to the fees to be received by these officers, for their own services, in the discharge of the duties imposed upon them. There was no reason why, in respect of such fees, these officers should not be under the same liabilities, both civil and criminal, as are all other officers under the King's government. It was not

(1) 4 T. R., 553.

(2) 2 East, 253.

of an improper exercise of authority, in the enforcement of the revenue laws of which the Plaintiff complained; nor, as in the case of *Greenway* vs. *Hurd*, for an abuse of the discretion in the Defendant; but it was for exacting and receiving money, as due to him for fees, to which by law he had no title. The act complained of was not done by reason of his office, *virtute officii*, but by color of his office, *colore officii*, which was the true distinction on such occasions. On general reasoning, therefore, the objection taken could not be supported. There were, however, positive authorities upon this point, and the cases of *Irving* vs. *Wilson* (1) and *Umphelby* vs. *McLean* (2) were cited. In the latter case, it had been expressly decided that notice of action, under the statutes, was not necessary in an action against a collector of taxes for retaining too large a sum as fees, out of the produce of property distrained.

The ADVOCATE GENERAL, in reply, insisted that the cases cited were perfectly distinguishable from this, because if it had been the intention of the legislature to confine the provisions of the statutes requiring the notice to actions of tort, or, if the object had been merely that they might tender amends, it would have been so stated. If the act were held not to extend to actions of assumpsit, it would then become nugatory, for, in every case, one might waive the tort, and sue in form *ex contractu*.

SEWELL, CH. J.: I cannot entertain a doubt on this question. The provisions of the statute are obviously dictated by reasons of public policy, and are intended to protect the public officer in the fair execution of his duty towards the public. The legislature with this view has enacted, that no action shall be instituted against him, after the expiration of a limited period, and that he shall have a month's notice of any action which it may be intended to institute against him within that period. But this is not an action brought to recover back any portion of money belonging to the public; it is for money had and received by the Defendant, as fees of office *due to him*, and which, as he alleges, he has a right to retain *to his own use*. By what law, between man and man, is any person authorized to retain money which, *ex æquo et bono*, he ought to refund, because it has been in his possession for the space of three months? "I do not see," said lord Ellenborough, in the case of *Wallace* vs. *Smith*, "how acts of spoliation can be said to be done in pursuance, or by colour of an act of parliament." (3)

(1) 4 Term. Rep., 485.

(2) Barn and Ald., 42.

(3) 5 East R., 119.

The current of authorities support this distinction. In *Irving* vs. *Wilson*, which has been cited at the bar, the action was instituted by the owner of certain goods, for money paid to a custom house officer, to redeem them from a seizure to which they were not liable, and lord Kenyon held that the action was well brought and that notice was not necessary. The case of *Greenway* vs. *Hurd*, which has also been cited at the bar, on the part of the Defendant, came afterwards, before the same learned judge; but the principle, upon which it was decided, in this case, that notice *was* necessary, was quite different from that on which, in the preceding case of *Irving* vs. *Wilson*, it was decided that notice was not necessary. In the case of *Greenway* vs. *Hurd*, the action was brought to recover certain *duties* received by the Defendant, after the act which imposed them had been repealed, the demand was for money which had been paid to the Defendant, in his public capacity, for the use of the public, and it was, moreover, in evidence that the Defendant had paid over the whole amount, which he had received, to his superior in office. There was no discrepancy, therefore, in these decisions of lord Kenyon. But, the case of *Umphelby* vs. *McLean* is conclusive. In that case, the action was for money had and received, and was brought to recover the amount of an excessive charge made by the Defendant as a collector, on a distress, for arrears of taxes, and it was held that the Defendant was not entitled to a month's notice, before action brought. I am, for these reasons, of opinion that the objection which has been taken by the Defendant must be overruled.

KERR, J.: The question appears to me, upon the short time I have had to consider it, one of great importance, as connected with the duties of a high public officer, and, in the absence of direct authorities, I cannot, without further consideration, represent myself as master of the subject.

No order was made, but the question was reargued in the term following, and the objection overruled by the whole court. (*Stuart's Rep.*, p. 179.)

PUBLIC OFFICER.—FEES.

COURT OF KING'S BENCH, Quebec, 18th April, 1825.

PRICE, against PERCEVAL.

Held : That, no fee of office can be exacted by a public officer, unless established by legislative enactment, or by ancient usage which presupposes the sanction of legislative authority.

The action for money had and received will lie, for exorbitant fees paid to custom house officers, and in the name of the owner of a vessel, although paid by the master.

The Imperial statute, 5th Geo. III. ch. XLV, enacts that where no fees have been established in a colony of Great Britain, the custom house officers there shall be entitled to receive such fees as were received by the like officers in the nearest port in any British colony before the 29th September, 1764, and the court will take notice of the relative geographical positions of countries to ascertain that port. (1)

This was an action for money had and received, brought by the Plaintiff, against the Defendant, to recover back the amount of certain sums of money which had been claimed and received by the Defendant, in his capacity of collector of the customs, at the port of Quebec, as lawful fees of office, under the authority of the 27th section of the British statute, 5th Geo. III, ch. XLV, which, " in order to prevent any disputes concerning what fees the officers of His Majesty's customs, in the British colonies or plantations, in America, may be entitled to, for making entries, or other business done by them, in the execution of their employments, " (until such time as the same shall be otherwise settled by the authority of parliament, and, provided also, that the fees taken are not contrary to the express direction of any act of parliament made in Great Britain), enacts, " that in all and every port or place, on the continent of America, within His Majesty's dominions, where no fees have been received by any officer of the customs, such officer shall be entitled to the same fees as have been received by the like officers, in the nearest port in the said colony or plantation, on or before the 29th day of September, 1764, and if no fees have been received by any officer, in any port, in such colony, or plantation, such officers shall be entitled to such fees as have been received by the like officers in the nearest port; within any British colony or plantation, on or before the said 29th day of September, 1764." The Plaintiff averred that the fees taken by the Defendant were exorbitant, and that they had been received without any lawful or sufficient authority.

SEWELL, CH. J.: Objections have been made to the form of this action, but the case of *Stevenson* vs. *Mortimer*, which was cited at the bar (2) shews that the action for money had and received lies, " for exorbitant fees paid to custom house officers," and " that it is well brought by the owner of the vessel upon which they have been paid by the master. " The same case, coupled with what is said by lord Kenyon, in the case of *Irving* vs. *Wilson*, (3) shows also, that money taken by officers

(1) Les statuts impériaux concernant les douanes ne sont plus en force ici, mais cette cause est résumée à cause des principes généraux concernant les employés publics qui s'y trouvent énoncés.

(2) Cowper, 805.

(3) 4 T. R., 485.

of the revenue, which they are not authorized to demand, " cannot be called a voluntary payment. "

Objections have likewise been urged against the evidence which is before us. It has been said that the fees to be taken at the port of Quebec are those which, on the 29th September, 1764, were taken at the nearest port, and that Halifax ought, therefore, to be proved to be the nearest port; and it has also been said, that nothing but the original table of the fees taken at Halifax can be received in evidence. To the first it would probably be a sufficient answer to say, that there are many facts of public notoriety which courts of law are bound to notice without strict proof, and that of these the relative geographical positions and general limits of provinces, *inter se*, must be one : as Halifax, therefore, was the only port of Nova Scotia, in 1764, and as Nova Scotia, at that period, included the present province of New Brunswick, and, consequently, was bounded by Canada, if we measure by land, the port of Halifax, being co-extensive in its limits with the province of Nova Scotia, was in this view of the subject, in the year 1764, the nearest port ; and if we measure by water, which seems to be the proper construction, Halifax, if even locally considered, was still the nearest port, as it was the first at which a ship would arrive in a voyage from Canada, along the sea coast of the then British provinces in America. It is not, however, necessary to have recourse to any legal presumption of this description. For although it be true, as was argued, that the best evidence is to be given that the nature of the case admits, it is equally true that the strongest possible assurance of a fact is not required ; and that, when a Defendant, against whom it would otherwise be requisite to produce particular proof of any fact, has, by his own conduct, precluded himself from disputing that fact, strict proof is not required. (1) Now, in this case, the Defendant founds his right to retain the money which is demanded, as much upon the Halifax docket or table of the fees taken at the custom house of that port, on the 29th of September, 1764, as upon the statute, 5th Geo. III, ch. XLV, and no other than the Halifax docket is in evidence on either side. The copy of this docket or table of fees (on which the Plaintiff relies, as well as the Defendant) has been produced and fyled by the latter upon notice from the Plaintiff to produce it ; and it is in evidence that this copy has been for many years suspended publicly in the custom house at Quebec, as the tariff of the port, and was upon many occasions referred to, by the Defendant *personally*, as his authority for the fees which he claimed and received ; and this

(1) 2 Phillips, *on evidence*, 209, 215.

conduct is an admission on the part of the Defendant that Halifax, on the 29 September, 1764, was the nearest port; for, if this was not the case, he can have no right to fees, upon the authority of the Halifax docket. This conduct of the Defendant is also an admission that no fees were taken, at the port of Quebec, or, in any other port of Canada, before the 25th September, 1764; and, consequently, an answer to another objection which he has made to the evidence before us, by which it is urged, that, as he is charged with a breach of duty, it was incumbent on the Plaintiff to prove this charge, though it might involve a negative, and that the Plaintiff, under the statute, 5th Geo. III, ch. XLV, was bound to prove that *no* fees were taken at the port of Quebec, antecedent to the 29th September, 1764; for, if any fees were taken at the port of Quebec, or in any other port of Canada, before that day, the Defendant can have no right to fees upon the authority of the docket of a port in another province. It is an answer also to the argument which has been raised upon 10th Geo. III, ch. XXXVII, and the 45th Geo. III, ch. LXVIII, by which the former statute is made perpetual. For, although these statutes declare, "that the officers of the customs in the colonies may lawfully demand and receive such fees as they and their predecessors respectively were and had been generally and usually accustomed to demand, take and receive *before the 29th of September, 1764*," yet, if no fees were taken by the customs house officers of the port of Quebec, before that day, these statutes can have no bearing upon the question now before us.

The establishment of fees to be taken by the officers of any government, is an act of legislation, and, in its effect, an act of taxation. It is a declaration that such officers shall not be obliged to discharge the duties required by law, in their several stations, without a fixed reward; and, as this reward is to be paid by the subject of the government, it is to them a prescribed rule of action, which they cannot but obey, when the execution of the duties so required is asked on their behalf; and a tax, because their obedience to this rule of action unavoidably takes money from their pockets. With us, it is not in the power of the Crown to create any new offices, with new fees annexed to them, or to annex new fees to old offices. (1) So that fees, to speak generally, must either be established, and ascertained by legislative enactment, or by ancient usage which presupposes the sanction of legislative authority. (2) And with respect to custom house fees, this is particularly true, not only in the

(1) 2 Inst., 553; 1 Black. Com., 272.

(2) Chitty, *on prerogative*, 81.

parent state, but in the colonies. By the 12th Car. II, ch. IV, sec. 7, it is enacted, " That officers of the customs, in the several ports where the goods exported or imported amount to the value of five pounds or more, shall take and receive such fees, and no other, as were taken in the 4th year of the late king James, *until the said fees shall be otherwise settled by the authority of parliament.* By the 24th article of " the rules, orders, directions and allowances, " annexed to the same statute, (1) " for avoiding all oppressions by any of the officers of the customs in any port of this kingdom, in exacting unreasonable fees *from the merchant, by reason of any entries, or otherwise touching the shipping or unshipping of any goods, wares or merchandize;* it is ordered, " that no officer, clerk or other, belonging to any custom house whatsoever, shall exact, require or receive any other or greater fee of any merchant, or other, whatsoever, *than such as are, or shall be established by the Commons in parliament assembled.* " By the 14 Car. II, ch. XI, sec. 34, double costs and damages are imposed by way of penalty, upon every person " employed in His Majesty's customs, who shall demand or take any other or greater sum of money *than by law is now due, or shall hereafter become due.* " And, by the 8th of Anne, ch. XIII, sec. 26, it is again enacted, " that the fees of the officers of the customs *legally* due on the 31st July, 1710, shall continue payable, *till altered by the Commons of Great Britain in parliament.* " In addition to these statutes, it is, by the 6th William and Mary, ch. I, sec. 5, provided that all officers of the customs, in the port of London, in the out *ports, and elswhere,* shall, at their respective admissions, take their corporal oath, " that they will not take or receive any reward or gratuity, directly or indirectly, other than their respective salaries, and what is or shall be allowed them from the Crown, *or the regular fee established by law, for any service done in the execution of their employments in the customs, on any account whatsoever;* " and, by the printed instructions given by the commissioners of the customs to the collectors in America, it appears that this oath is taken under the authority of this act, as well by officers in the colonies as in England. Lastly, by the 27th section of the 5th Geo. III, ch. XLV, which has already been stated at large, it is enacted, that the fees which the custom house officers, in the

(1) Of these rules, etc., the 13th, 18th, 19th, 22nd, 24th and 25th, are re-enacted by the consolidation act, 27 Geo. III, ch. XVIII, sec. 1st, 32d, 33d and 34th. See the statute and Nodin's *British duties.*

Under the authority of this section of the rules and orders, a book of fees for the custom house, was established, A. D. 1662, by the House of Commons, and signed by the speaker. See Journals of the Commons, 17th May, 1662, and Nodin's *British duties,* p. 37, where it will be found.

British American colonies, are authorized *by that act* to receive, and " may be entitled to for making entries, and other business done by them, in the execution of their employments, shall be by them received, until such time as the same shall be otherwise settled by the authority of Parliament. " From these statutes it appears evidently, not only that the claims of custom house officers to fees in the ports of British America are limited to fees which are established by law but that they are due only for services required by law to be done, in the execution of their respective offices, and actually performed by the officer; and, this being the criterion by which the legality of the fees now in dispute between the parties in this cause must be decided, it remains for us to enquire and to determine how many and which of them fall within this description.

Upon the first establishment of the North American colonies, Parliament thought it necessary to take some measures for the regulation of the plantation trade: the act of 12th Car. II, ch. XVIII, accordingly, declared the qualifications, which should be required for vessels trading to the colonies, and enjoined the governor, or person by him appointed, to inspect and take care that the act in this respect was duly executed, and to take bonds for all vessels lading any of the commodities which it enumerated. By the act of the 15th of Car. II, ch. VII, further regulations were made, and every person *importing goods into the colonies* was required to deliver to the governor of such colony, or to such person or officer as should by him be authorized and appointed, " a true inventory of all such goods. " No duties were laid at this time, nor until ten years after, upon any commodities in the plantations, but certain duties having been imposed by the act of the 25th of Car. II, ch. VII, on sugars and certain other articles, to be paid in the plantations, it was, by the 2nd and 3rd sections of the same statute, enacted, " that the several duties so imposed should be levied and paid to such collector or other officer in the plantation, as should thereafter be appointed, and should be levied under the superintendence of the commissioners of the customs in England. " Such is the origin of the custom house in the colonies. It was afterwards enacted, by the 11th and 6th sections of the 7th and 8th of William III, ch. XXII, that the officers of the customs, in the plantations, " should be appointed by the Lords of the Treasury, and the commissioners of the customs in England, " and that all ships coming into, or going out of any of the said plantations, and lading or unlading any goods or commodities, and the masters thereof, and their ladings, should be subject and liable to the same rules, visitations, searches,

penalties and forfeitures, as to the entering, lading, or discharging their respective ships and ladings, as ships and their ladings, and the masters thereof are subject and liable to in this kingdom, " (that is to say, in England), " by virtue of the 13th and 14th Car. II, ch. XI. "

After these general observations, we proceed to the consideration of the several fees, which have been demanded and received by the Defendant, upon the several entrances and clearances of the Plaintiff's vessels, specified in the bill of particulars and in the evidence. These consist of fifteen items, all of which are charged against the ship, seven upon the voyage inwards, and eight upon the voyage outwards.

We are of opinion that the charge of nine shillings sterling, as a fee for the general entry inwards of each vessel, is a lawful fee, and is properly a charge against the ship; that the charge of one shilling and six pence sterling, as a fee due to the Defendant upon the ship's report inwards, in addition to the fee charged and received for *the general entry*, is not a lawful fee, and cannot be retained; that the charge of two shillings sterling, as a fee due to the Defendant for a certificate of the ship's report inwards, is not a lawful fee, and cannot be retained; that the charge of one shilling and six pence sterling, as a fee due to the Defendant for a warrant to the master to unload, is not a lawful fee, and cannot be retained; that the charge of two shillings sterling, for the anchorage of the vessels in question, is not a lawful fee and cannot be retained; that the charge of thirteen shillings sterling, for recording the register of the vessels in question upon each voyage inwards, is not a lawful fee, and cannot be retained; that the charge of four shillings and six pence sterling, as a foreign topsail fee, upon each of the vessels in question, and upon each voyage inwards, is not a lawful fee; that the charge of one shilling and six pence sterling, as a fee for the master's report of each of the vessels outwards, is a lawful fee, and is properly a charge against the ship; that the charge of two shillings sterling, for a certificate of the ship's report outwards, is not a lawful fee; that the charge of one shilling and six pence sterling, for a warrant to the master to unload is not a lawful fee; that the charge of one shilling and six pence sterling, for a bill of stores, is a lawful fee; that the charge of two shillings sterling, for a cocquet on stores, is not a lawful fee; that the charge of one shilling and six pence, sterling, for the list of men, is not a lawful fee; that the charge of four shillings and six pence sterling, as a foreign topsail fee, upon each of the vessels in question, and upon each voyage outwards, is not a lawful fee, and that

the charge of nine shillings sterling, as a fee for the general clearance outwards of each vessel, is a lawful fee.

Justices KERR, PERRAULT and BOWEN, concurred in the judgment. (*Stuart's Rep.*, p. 189.)

PUBLIC OFFICER.—ACTION OF DAMAGES.

COURT OF KING'S BENCH, Quebec, 20th April, 1826.

PATERSONS and WEIR, against PERCEVAL.

Held : That, by the words " first or sterling cost," in the Prov. Stat., 53 Geo. III, ch. XI, imposing duties on the importation of certain goods, is to be understood, the price paid for them at the place from whence they were exported, less the discount. (1)

And an action on the case may be maintained, against a collector of the customs who refuses to admit the goods to an entry, until duties, as calculated upon the price of the goods, without a deduction of the discount, have been paid. (2)

SEWELL, CH. J. : This is an action on the case, against the collector of the customs, as a ministerial officer, (3) for refusing to perform a duty which he was bound to perform, in the execution of his office, by which the Plaintiffs were injured. There are very few instances in which a public officer is answerable for an act fairly done in the performance of his duty to the best of his judgment. (4) Yet, an action on the case has been maintained against the commissioners of the customs, for an omission of duty simply, (5) and, in all cases where the act of a public officer is *wilfully* done, that is to say, *is done contrary to his own conviction*, and shews *partiality* in the execution of the trust reposed in him, his conduct amounts to misbehaviour in his duty, for which he is clearly answerable. (6) The Plaintiffs in this cause have proved a case, which makes it impossible to suppose that mere error in judgment or mistake in law, was the cause of the conduct of which they complain. It appears that there are certain goods, such as hardware, Holland tapes and ounce threads, which, in every invoice, are charged at the same gross prices, and deductions or discounts, which vary according to the state of the market

(1) Ce statut n'est plus en vigueur.

(2) V. art. 1022 C. P. C.

(3) *Schinotti* vs. *Bumstead*, 6 T. R., 646,

(4) *Drewe* vs. *Coulton*, 1 East, p. 563, note b, per Wilson J.

(5) *Lacon* vs. *Hooper*, 6 T. R., 224.

(6) Buller, N. P., p. 64 ; *Harman* vs. *Tappenden*, 1 East, p. 555.

at the time of the purchase, are made upon the face of each invoice, so that the value of such goods, usually called the short prices, is ascertained by the amount of the deductions, and as the balance so established is the price actually paid by the purchaser, it is consequently " *the first* or sterling *cost* " of all goods so situated.

By the Provincial Statute, 53 Geo. III, ch. XI, sec. 1 and 2, it is enacted, " that all and every person or persons whatso-" ever, who shall import or bring within this province, any " goods, wares or merchandise of any kind whatsoever, shall " immediately produce to the collector of the customs of the " district wherein such importation shall be made, the original " invoice of the goods, wares or merchandise which shall be " so imported as aforesaid, and the importer or importers of " such goods shall make and subscribe an affidavit, upon " which the collector is empowered to take and administer the " oath, and shall pay a duty of two pounds ten shillings per " centum, to be calculated on the first or sterling cost of each " one hundred pounds worth of such goods, and so in propor-" tion for a greater or less quantity thereof." On the occasion which gave rise to this action, the entry of a certain quantity of Holland tapes was tendered by the Plaintiffs' clerk to the Defendant. He objected to the calculation or the duty upon the balance which remained, after deducting, according to the invoice, the discounts from the gross prices, and expressly refused to admit the goods to entry, unless the duty was paid upon the gross prices, without any deduction whatever. The Plaintiffs then called upon the Defendant, by protest, to admit the tapes to an entry, and tendered the affidavit required by the statute, together with the amount of the duty calculated upon the *short prices;* yet, notwithstanding this formal demand of his duty, the Defendant again refused in these words, "I make no answer." The Plaintiffs, then, finding that the tapes could not otherwise be entered, paid the amount of the duty calculated upon the gross prices.

Now, it is distinctly in evidence that the Defendant had, before, been in the constant habit of admitting to entry all similar goods, upon payment of the duty calculated upon the short prices; and that, during the very period of his altercation with the Plaintiffs, and, after it, he admitted similar goods, belonging to others, to entry, upon payment of the duty calculated upon the short prices. The inferences from these facts are irresistable, they show that the Defendant's conduct, towards the Plaintiffs, was contrary to his own conviction, wilful and wrongfully partial, and judgment must be entered

against him, for the damages demanded, with costs. *(Stuart's Rep.*, p. 215*)* (1)

A. STUART & BLACK, for the Plaintiffs.

The ATTORNEY GENERAL, for Defendant.

The case of *Patersons & al.*, against *Perceval* was carried to appeal. Here, follows the judgment of the Court of Appeals.

RESPONSIBILITY.—PUBLIC OFFICER.—DAMAGES.

COURT OF APPEALS, Quebec, 18th January, 1828.

On appeal from Quebec.

The hon. M.H.PERCEVAL, Appellant, and PATERSONS and WEIR, Respondents.

An action of trespass on the case, for a misfeasance, can be maintained against a collector of the customs, for exacting a larger sum, for duties, than the law authorizes, unless some reasonable ground of excuse for his conduct is shewn, or such facts be laid before the court as will exclude every imputation of malice or wilful intent.

If the declaration, in this action, contain a statement of all the material facts, it will be sufficient.

Where special damages is the gist of the action, and it be not alleged, or, if alleged, be not proved, the action must be dismissed. But where the law gives a right of action for an injury, it presumes that damages are the consequence, and a conclusion for general damages will be sufficient.

REID, CH. J.: The Appellant denies to the Respondent a right to recover damages, under the present form of action, because, 1. This action can only be considered as an action *condictio indebiti*, or an action to recover back the excess of duty paid, as to the Appellant, as there is no ground upon which it can be maintained against him, as a public officer, for any breach of his duty, as such. 2. Enough is not stated in the declaration to maintain the action, and, more particularly, because the sterling cost in the invoice of the goods imported is not set out, so as to shew the amount due on that importation. That the duty of the public officer was not stated, nor were the circumstances of the injury, or special damages, so set out, that the Appellant could answer thereto, or the Respondent be entitled to damages.

(1) The remedy against a public officer, for neglect or misbehaviour, may be by an action on the case, alleging his misdemeanour, or by an action of debt, according to the nature of the misfeasance, but, never by assumpsit, as an implied promise to do his duty. *McMillan* vs. *Eastman*, 4 Massachusetts Rep., 378.

The words "true value," in an act imposing duties, mean the actual cost of the goods to the importer, at the place from which they were imported, and not the current market value of the goods at such place, *The United States* vs. *Tappan*, 11 Wheat, 419.

With reference to these two grounds, we must first determine what the nature of this action is, and we will, thereby, limit the objects of discussion to a few points. It cannot be considered as an action *condictio indebiti*, or, merely to recover back monies wrongfully paid. It is an action on the case, for a misfeasance against a ministerial officer, in the discharge of his duty, not merely for refusing to perform what this duty required, but for exceeding his authority, in the discharge of that duty; for compelling the Respondents to pay more than by law they were bound to pay, not from any misapprehension of the law, but *wilfully* and *maliciously*, with a view to injure the Respondents, and to prevent them from importing these goods, as by law they were entitled. This language of the declaration cannot be misunderstood, and upon an examination of the authorities cited, it will be found that this action can be maintained.

In the case of *Drewe* vs. *Coulton*, (1) which was an action against a returning officer, for refusing the vote of the Plaintiff, Mr. justice *Wilson* said, "this is, in the nature of an action for misbehaviour by a public officer in his duty; now, I think it cannot be called a misbehaviour, unless *maliciously* and *wilfully* done, and that the action will not lie for a mistake in law. In all the cases put, the misbehaviour must be wilful, and, by wilful, I understand contrary to a man's own conscience." But, we need not have recourse to any law authorities to say, that no man shall be permitted wilfully to abuse his office, or, by a malicious exercise of it, to injure another without incurring responsibility in some shape. The declaration contains all that is requisite to support an action on the case against a public officer. "In actions on the case, when the act or non feasance complained of, was not *prima facie* actionable, it is, in general, necessary to state, not only the injury complained of, but, also, the circumstances under which it was committed, as that the Defendant, *maliciously and fraudulently contriving and intending*, etc., (stating a bad intent, corresponding with the wrongful act complained of), committed or permitted the act complained of." (2) Now, this is sufficiently set out in the declaration. The, *wrong*, the *injury*, and, the *intent*. Again, it is said, (3) "that the declaration, in an action for misfeasance in an officer, must shew that the Defendant was an officer, what it was his duty to do, and that he acted contrary to his duty.

But, it is contended, by the Appellant, that the declaration

(1) 1 East's *Rep.*, 563.

(2) Chitty's Pl., p. 376.

(3) 5 Com. Dig., 590, (2°).

is defective, as it does not shew what the duty was which he had to perform, and, more particularly, because the sterling cost in the invoice was not set forth so as to shew the amount due on the goods imported. The Provincial Statute, (1) however, does not specifically require this, but, merely says, that upon goods, wares and merchandizes imported into this province, a certain duty shall be paid, to be calculated on the *first* or *sterling cost* of each £100 worth of such goods. In the declaration, we find it stated that, on the 23d day of May, 1825, the Plaintiffs were possessed of divers large quantities of goods, of the value of £643 10s 1d sterling money of Great Britain, which they imported into this province, at the port of Quebec, and which were liable and chargeable with certain duties to His Majesty. That of this importation the Plaintiffs gave notice to the Defendant, as collector, and, then and there, produced to the said Defendant, as such collector, the *original invoice of the said goods so imported*, and, then and there, offered, etc. All that was essential on this point is certainly here stated, and in a way to meet the objection made, viz. the sterling cost of the goods imported, notice thereof to the Appellant, and a communication to him of the original invoice, the doing of what was needful thereon, the payment of the duties, etc. The declaration might have been more minute, but all the material facts are stated. In the authority last cited, it is said, "if the declaration shews the misfeasance, it is sufficient, though it *omits* several circumstances not material."

It has been further objected, that this action cannot be maintained, without shewing the special damage sustained by the Respondents, and that the conclusion in the declaration *to the damage of the Plaintiffs, so much*, is too general and applicable only to cases of debt or assumpsit, where the conclusion in damages must necessarily apply to the extent of the debt or undertaking declared upon, but that, in this case, a general damage does not flow from the nature of the action, as the necessary consequence of the Appellant's neglect of duty as a public officer. But the principle here assumed is taken too largely, a distinction must be made between cases of *general* and *special* damage, according to the circumstances of the case. If an action cannot be maintained, but by reason of the special damage occasioned by the act complained of, the special damage becomes the gist of the action, and if no special damage be laid, or if laid be not proved, the action must be dismissed. But, when the law gives a right of action, for an injury complained of, it presumes that damages arise from such injury, and a conclusion for general damages is

(1) 53 Geo. III, ch. XI,

sufficient. It is clearly settled that the law gives an action against a public officer, for a wrong done by him in his office, when alleged to be done wilfully and maliciously, and damages, being a natural consequence, may be demanded generally.

Upon the general issue, several objections have been urged, as there being no proof of notice of action; of the tender of entry to be made, at the custom house; of the protest, or of the signature of the notary to it; of the entry in the books of the custom house under which the extra duty was paid, the original not being produced; nor of any act done by the Appellant personally.

We consider the evidence adduced to be sufficient, on all these points. The only question which remains, and the most material in the case, is whether sufficient evidence has been adduced to support the allegation of a malicious intention on the part of the Appellant, by his refusal to receive the duty on the short prices of the goods imported, and by exacting the duty on the larger or nominal prices. The evidence bears strongly against the Appellant, it ascertains the fact that different individuals, at different times, and, for a long time past, have made entries, at the custom house, on the invoices of goods imported by them, and paid the duties upon the short prices, as a matter of course, and without objection or difficulty. Independent of this being the interpretation to be put on the law, it would seem to have been the constant practice, at the custom house, to receive the duties upon the short prices. It does not appear to have been a matter of contest or of doubt, not a single instance to the contrary is shewn but the one before us, and it is difficult to account for its being raised on this occasion. It was the interest, and, we must say, the duty of the Appellant to have laid before the court such facts as would have shewn some reasonable ground of excuse for his conduct, and thrown all imputation af malice or wilful intent out of the question. If he was in possession of such evidence, but did not see fit to adduce it, we regret that, as a public officer, he did not avail himself of so effectual a means of defence against an action of this nature. But taking the facts as they stand before us, uncontroverted or explained by any evidence on the part of the Appellant, we find nothing to justify, or excuse his conduct; he has made no case for the court to hesitate or deliberate upon, and we must draw that conclusion from the evidence which the court below has done.

Judgment affirmed. (*Stuart's Rep.*, p. 270.)

MORTMAIN.—WILL.—REQUEST.

McGILL COLLEGE.

COURT OF APPEALS, Quebec, 29th April, 1826.

On appeal from Montreal.

FRANÇOIS DESRIVIÈRES, Appellant, and the Hon. JOHN RICHARDSON and others, Respondents.

Held: That the declaration of the King of France, which requires a licence in mortmain, in certain cases, is repealed by the Prov. Stat., 41 Geo. III, ch. XVII, so far as respects the Royal Institution for the advancement of learning. (1)

The bequest of a sum of money to trustees, for the benefit of a Corporation not *in esse*, but in apparent expectancy, is not to be considered a lapsed legacy. (2)

A similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a university or college, upon condition that the same be erected and established within ten years from the testator's decease, such condition is accomplished, if a corporate and political existence be given to such university or college by letters patent, emanating from the Crown, although a building applied to the purposes of such university or college may not have been erected within that period of time.

McGill, a gentleman of large, real and landed estate, made his will, at Montreal, on the 8th day of January, 1811, by which he left a large portion of his fortune to the Appellant, who was in no degree related to him by blood; and, to shew his love of learning, and, to perpetuate his name, he bequeathed to the honorable John Richardson, and James Reid, of the city of Montreal, the reverend John Strachan, rector of Cornwall, Upper Canada, and James Dunlop, of the said city of Montreal, and to their heirs, a tract of land called Burnside, containing 46 acres, including an acre of land purchased by him from one Sanscrainte, together with the dwelling house, and other buildings thereon erected, with their appurtenances, in trust, that they should, by a good and sufficient conveyance and assurance, convey and assure the same to "The Royal Institution for the advancement of learning," constituted, or to be constituted, under an act of the Provincial Parliament of the 41st of His late Majesty, ch. XVII, intituled "An act for "the establishment of free schools, and the advancement of learning in this province;" upon condition that the Royal Institution, to use the words of the testator, "do and shall, "within the space of ten years, to be accounted from the time

(1) V. art. 366 C. C.

(2) V. art. 838 C. C.

" of my decease, *erect and establish, or cause to be erected or* " *established,* upon the said last mentioned tract or parcel of " land, an university or college, for the purposes of education, " and the advancement of learning in this province, with a " competent number of professors and teachers, to render " such establishment effectual and beneficial, for the purposes " intended ; and, if the said Royal Institution for the advance- " of learning should so erect and establish, or cause to be erec- " red and established an university, then, upon condition also, " that *one of the colleges* to be comprised in the said university, " should be named and perpetually be known and distinguished " by the appellation of *McGill College ;* and, if the said Royal " Institution for the advancement of learning should not so " erect and establish, or cause to be erected and established an " University, but should erect and establish, or cause to be " erected or established a college only, then, upon the further " condition, that the said college should be named and perpe- " tually be known and distinguished by the appellation of " *McGill College.*" The testator, further, provided, that, until such university or college should be erected, the said Royal Institution, to use the testator's words, "*shall permit my said* " *wife, and, in case of her death, the said François Desrivières,* " to hold, possess and enjoy the said last mentioned dwelling " house, buildings and premises, and to recover, have and " receive all and every the rents, issues and profits thereof, to " and for her and his use and benefit. And, upon this other " and further express condition, that, if the said Royal Institu- " tion for the advancement of learning should neglect to erect " and establish, or cause to be erected and established, such " university or college as aforesaid, *in manner aforesaid,* " *within the said space of ten years, to be accounted from the* " *time of my decease,*" then and in such case, the said conveyance to the Royal Institution, should, after the expiration of the said ten years, be absolutely void. And, upon trust, that the Respondents (Plaintiffs in the court below), and the survivor of them should permit the testator's widow, or, in case of her death, the Appellant, to enjoy the said land, dwelling house and premises, and recover, have and receive the rents and profits thereof, until the making and executing of the said conveyance and assurance to the Royal Institution. And it is provided, by the testator's will, that, if the Royal Institution should refuse to accept the said conveyance and assurance, upon the said condition or should, after the making and accepting of the said conveyance and assurance, " neglect " to erect and establish, or cause to be erected and esta- " blished such university or college, as aforesaid, in " manner aforesaid, within the said space of ten years, to be

"accounted from the time of his decease; or, if from any "legal cause, matter or thing, the said trust so as aforesaid, to "convey and assure the said tract or parcel of land and premi-"ses to the said Royal Institution for the advancement of "learning, in the manner herein before directed, should be "incapable of being accomplished or carried into effect, or "otherwise become or be deemed or be construed to be inva-"lid, illegal or inoperative, then, and in either or any of those "cases," upon trust, that the Respondents, or the survivors or survivor of them, or their heirs, etc., do and shall, from and after the expiration of the said space of ten years, by a good and sufficient conveyance and assurance, convey the said tract of land and premises to the Appellant, if then living, and to his heirs and assigns for ever, or, if dead, to his legal heirs then living, and to their heirs and assigns for ever.

The testator further directs, that, out of the rest of his estates, real and personal, which shall or may remain, after satisfaction of all legacies, the sum of £10,000 shall be paid to the said John Richardson, James Reid, John Strachan and James Dunlop, their heirs, executors and curators, to and for the purposes, and upon the condition following, that is, upon trust, that they "do and shall pay the said sum of £10,000, "with the interest to accrue thereon, from and after three "years from his decease, to the said Royal Institution for the "advancement of learning, when and as soon as the said "Royal Institution for the advancement of learning shall have "erected and established, or caused to be erected and establis-"hed, a university or college, upon the last mentioned tract "or parcel of land hereinafter directed to be conveyed to the "said Royal Institution for the advancement of learning, in "manner aforesaid, to be, by the said Royal Institution for "the advancement of learning, paid and applied towards de-"fraying the expense incurred in erecting and establishing "the said university or college, and towards maintaining the "same, after it shall be erected and established, in such man-"ner and form, and, under such regulations as the said Royal "Institution for the advancement of learning shall, in this "behalf, prescribe: Provided, always, that such university "or college be erected and established within ten years, to "be accounted from the time of his death." It goes on to provide, that, if such college should not be erected within the space of ten years, then, upon trust, that the Respondents, their survivors or survivor, or their heirs, etc., from, and immediately after the expiration of the said ten years, do and shall pay over the said £10,000, with interest accruing thereupon, to the Appellant, Desrivières, if alive, to and for his use and

benefit, or, if dead, then to his legal heirs then living, to their use and benefit.

The testator died on the 19th of December, 1813. On the 8th of October, 1818, His Majesty, by his letters patent, under the great seal of the province, constituted and established the corporation referred to in the Provincial Statute, 41st Geo. III, ch. XVII, by the name of "*The Royal Institution for the advancement of learning*," and, on the 13th December, 1819, other letters patent passed the great seal, by which a president was appointed to the Royal Institution, who was made an integral part of the same. The Royal Institution being thus created, His Majesty was graciously pleased, by writ of privy seal, dated at Westminster, the 31st of March, in the second year of his reign, to ordain and grant that, upon the land and in the buildings described in the testator's will, "there shall be established, from this time one "college, at the least, for the education of youth and students, "in the arts and faculties, to continue for ever, and that the "first college to be erected thereon, shall be called *McGill* "*College*," and His Majesty was also pleased therein to appoint certain high colonial officers, to be, with the principal elected by the same, governors of the said "*McGill College*; "and to declare that the same, and four professors, to be also "elected, shall be a body politic and corporate, in deed and in "name, by the name and style of the governors, principal "and fellows of *McGill College*."

In this action, the Plaintiffs, in the court below, the Respondents in this court, trustees under McGill's will, sought to recover from the executors and residuary legatee the sum of £10,000 and interest. The Appellant, one of the Defendants, and who had this money in his hands, intervened, as residuary legatee, and prayed that this money might be declared to belong to him, the legacy having become lapsed. (1)

(1) Under the devise above mentioned, and a subsequent conveyance of the estate of Burnside, by the devisees in trust, to the Royal Institution, the latter, after having obtained His Majesty's royal letters patent, erecting and establishing a college thereupon, by the appellation of McGILL COLLEGE, brought a petitory action, in the Court of King's Bench, at Montreal, to obtain from the Appellant the estate of Burnside, of which the following is a report :

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING *vs.* DESRIVIÈRES.

1. If the declaration, in a petitory action, contain a designation of the land by its name, that of the borough, village, or hamlet, and of the parish where it is situated, these will be sufficient, even if the boundaries be incorrectly stated. (1) But, if the designation be so far imperfect, that the Defendant cannot identify the land, he may plead this fact by an exception as to form.

2. Proof of a letter of attorney, executed *sous seing privé*, is not required, when a deed executed by the attorney in virtue thereof is proved, if the principal, by any subsequent use he has made of the deed has ratified it. (2)

(1) V. art. 52 C. P. C.

(2) V. art. 1221 et seq. C. C.

KERR, J.: This case comes before the court in such a shape that we are enabled to give a complete judgment on

3. The head of a corporation may bind the body corporate by any contract from which it may derive a benefit. (1)

4. A devise of real estate to a corporation, upon condition that it should, within the period of ten years, *erect and establish, or cause to be erected and established*, upon the said estate, an university or college. *Held*, that the words *erect and establish, &c.*, extend only to the erection and establishment of the corporation or body politic, forming the university or college, and not to the erection of a building in which the university or college is to be established.

5. To maintain a petitory action against a residuary legatee, a *délivrance de legs*, from the heir at law, is not required, the Quebec Act, and the Provincial Statute, 41st Geo. III, ch. IV, § 1, having, as respects testamentary donations, in cases where the heir at law has been entirely excluded from the succession by will, abrogated the rule of the French law, *Le mort saisit le vif.* (2) *Semble*, that the heir at law only can avail himself of the exception (if pleaded) that the Plaintiff had never obtained *délivrance de son legs.*

6. A licence in mortmain, under the declaration of the king of France of 1743, is not required to enable the Royal Institution for the advancement of learning to accept of a devise of real estate. (3)

7. If a corporation, to be composed of certain trustees to be subsequently named by the Crown, be established by statute, the existence of the corporation will commence at the time when the statute was passed, and not when the trustees are named.

8. The condition of a devise to the Royal Institution for the advancement of learning, that it should, within ten years, cause to be erected and established an university or college, bearing the testator's name, is accomplished, if an university or royal and not of private foundation, be erected and established within that period. (4)

In this action, the Plaintiffs claimed all that tract or parcel of land commonly called Burnside, situated near the said city of Montreal, containing about forty-six acres, including one acre of land purchased by the testator from one Sanscrainte, which said tract of parcel of land is contiguous to the St. Antoine suburbs of the said city of Montreal, and is bounded as follows, to wit: in the front thereof, by a street leading thereto, called St. Monique street, and, in part, by two lots of ground, the one belonging to Angus Shaw, and the other to Raymond Bellaire, on one side, to the south west, by land belonging to the representatives of the late Simon McTavish, and, on the other, to the north east, by land belonging to James McGill Desrivières, and, in the north west, by land also belonging to the said estate and succession of the said late Simon McTavish, deceased, together with the dwelling house and other buildings thereon erected, with their appurtenances.

The Defendant demurred to the declaration, and assigned special causes of exception or demurrer, which having been overruled, the Defendant answered upon the merits, 1. That he did not detain the land in question from the Royal Institution, in manner and form as declared. 2. That the allegations contained in the declaration were false, untrue and unfounded in law and in fact.

The will of McGill, dated the 8th day of January, 1811, was produced. It appeared that the testator died on the 19th December, 1813, from which period, his widow possessed and enjoyed the estate of Burnside, until her decease, on the 16th day of April, 1818, and, from that time, the Defendant possessed and enjoyed the same. On the 8th day of October, 1818, nearly five years after the death of the testator, the then governor-in-chief, in conformity to the Provincial Statute, 41st Geo. III, ch. XVII, by an instrument under the great seal of the province, appointed certain persons therein named, "Trustees of the schools of royal foundation in this province, and of all "other institutions of royal foundation, to be thereafter established for the "advancement of learning therein," and declared the said trustees and their successors a body corporate and politic, by the name of "The Royal Institution for the advancement of learning." On the 13th day of December, 1819, by two other instruments, under the great seal, an additional number of

(1) V. art. 360 C. C.
(2) V. art. 891 C. C.
(3) V. art. 366 et 369 C. C.
(4) V. art. 353 C. C.

all the points, and as regards all the parties; and, though it is not likely that the Respondents and Appellant will both be

trustees were appointed, the lord bishop of Quebec was named principal of the institution, and times and places fixed for the meetings of the members. On the 3rd day of August, 1820, by a notarial deed, made and executed at Montreal, the then surviving devisees, in pursuance of the trust reposed in them, conveyed to the Royal Institution the estate of Burnside, subject to the conditions prescribed in the will. The Royal Institution acted by and through Stephen Sewell, specially authorized as their attorney. By a clause in this deed, it was stipulated that the Royal Institution should accept and ratify the same within two months from the date thereof. On the 22nd day of August, 1820, at Montreal, the deed of conveyance was accepted and ratified, by an act passed before notaries, on which occasion, the Royal Institution was represented by the lord bishop of Quebec, principal of the institution. On the 31st day of March, 1821, letters patent were issued and granted, upon the petition of the Royal Institution, wherein the devise in question is recited, and, thereby, His Majesty did will and grant, that, upon the land of Burnside, and in the buildings thereon erected or to be erected, there should be established, from that time, *one college at the least*, for the education of youth, to continue for ever, and that the first college should be called *McGill College*, etc. Previous to the granting of these letters patent, a demand by notarial protest had been made by the Royal Institution, upon the Defendant, to surrender and deliver up the possession of Burnside, which he then refused to do. These documents were proved by authentic and certified copies. The procuration by the Royal Institution to Stephen Sewell was fyled, but of the seal of the corporation affixed to it, and of the signature of the principal of the institution subscribed thereto, no evidence was offered. There was annexed to the procuration, however, a written admission thereof as being that referred to in the deed of conveyance, and signed by all the parties to the deed, including the notaries. The decease of the testator was duly proved, as also that of Dunlop, one of the devisees in trust, previous to the execution of the deed of conveyance. The possession of Burnside was also proved to be in the Defendant. The Defendant proved, that the description of the property, as set forth in the declaration, was inaccurate, as respected the front, north east, and the rear boundaries.

PYKE, JUSTICE: This case is certainly one of importance, whether we consider the value of the property in contest, the benevolent and public object to which that property was destined by the will of McGill, or the legal questions to which it has given rise. The court has judged it necessary to be as explicit as possible, in declaring its opinion upon the several points submitted for consideration, anxious that the principles upon which its decision may be founded, should be clearly and distinctly understood, not only by those immediately interested, but by the profession at large; as several of the questions raised are of a general nature, the decision upon which may affect, not only the present case, but many others, which may hereafter be brought under the consideration of the court.

The four first clauses of the statute, 41st Geo. III, ch. XVII, appear to the court to be the basis upon which this action must stand or fall, and they should be fully brought into view. This law, worthy of the legislature of Lower Canada, will, perhaps, be attended with more solid and beneficial effects than any other to be found in our statute book; and it is the more highly to be considered, as it serves to record one of the numerous instances of the bounty of our late sovereign to his subjects in Canada. The late Mr. McGill, with this statute in view, and a full knowledge of its provisions (in the framing of which he, as a member of the legislature, had participated) on the 8th January, 1811, made the devise in question; (1) in virtue of which, and of a subsequent conveyance of the estate of Burnside, by the devisees in

(1) See ante, p. 217 et seq.

disposed to acquiesce in our judgment, in whatever scale our opinion may be cast, yet it becomes us to consider, and that

trust to, the Royal Institution, it is that the latter having obtained His Majesty's letters patent erecting and establishing a college upon the said estate by the name of McGill College has now brought the present petitory action.

1. The first objection taken by the Defendant's counsel is, that the designation of the land in real actions must be certain and full; and, it having been proved, on the part of the Defendant, that the designation in the declaration is not correct, as to the front, rear and north east boundaries, the land claimed not being sufficiently identified, the action ought to be dismissed.

In support of this objection, the ordinance of 1667, art. 3, tit. IX, has been cited, which requires, in real actions, that the property claimed should be fully described, as to situation and extent, as also by its *tenans et aboutissans*, *à peine de nullité*. Now, the intention of this article was to put Defendants in a situation to defend themselves, to the end, "*que le défendeur ne puisse ignorer pour quel héritage il est assigné*, and the nullity pronounced was but the *nullité relative* (1) which the courts were not bound to notice, unless specially pleaded. If, therefore, the designation is so obscure and imperfect as to produce uncertainty, a Defendant is not bound to answer, but can avail himself of this article by a preliminary plea or a peremptory exception as to form: as, however, the class of pleas founded on nullités relatives was not much favored in the French courts, the article in question, when pleaded, was seldom rigidly enforced, and the result was not always the dismissal of the action, but the plaintiff was ordered to amend, under no other penalty than the payment of costs. (2) But, if the Defendant pleaded to the merits, he was considered in this, as in all other matters of form, to have waived the exception, and to have tacitly admitted the sufficiency of the declaration. All the requisites of this article may not have been literally complied with, yet, if the designation of the land is so far explicit that the object could not be mistaken by the Defendant, the spirit and intention of the rule having been complied with, the French courts never allowed the mere letter of any article of the ordinance to be used for the sole purpose of vexation or delay, or in support of bad faith. (3) It is, therefore, obvious, that the objection is not supported by the article relied on by the Defendant. He has waived the benefit of it, by not pleading it in the first instance, as required by the practice of the court. It will be seen, further, upon reference to the declaration, that it is so far conformable to the article, as to afford no ground even for a preliminary plea. The property demanded is, in the first instance, correctly designated, both by name, situation and superficial contents, and it is only in the subsequent part of the description, when the boundaries are given, that error is to be found. The Plaintiff claims no more by his declaration than what was bequeathed, and the boundaries, in part erroneously stated, were not necessary for the support of the action, and may be rejected as surplusage, for, upon recourse to the article succeeding the one cited from the ordinance of 1667, it will be found to be as follows: "S'il est question du corps d'une terre, ou métairie, il suffira d'en désigner le nom ou la situation." This is an exception to the general rule, and and is thus explained by Jousse, "c'est-à-dire, le nom de la terre, ou métairie, et celui du bourg, village, ou hameau, et de la paroisse où elle est située." (4) The court, having all the facts of the case before it, may reject the erroneous boundaries, and may award to the Plaintiff what may be substantially described and claimed, viz.: the estate of Burnside, as bequeathed, containing about 46 acres of land. This objection we overrule, and it will remain for the court, should the Plaintiff be entitled to succeed in this action, to give such judgment, as the law and the facts of the case will warrant. The court cannot award

(1) 1 Pigeau, 161.

(2) 1 Jousse, tit. IX, art. 3.; *Vide* Rép. de Jur., v° aboutissans, and 1 Bornier, 57.

(3) 1 Pigeau, 161.

(4) 1 Jousse, note 1, p. 108.

maturely, whether the judgment of the court below, can or cannot be supported in law. The demand on the part of the

more than has been claimed in the conclusions of the Plaintiff, but it has the right, not only to award or reject, but also to modify the conclusions. "Le juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." (1)

2. It has been objected, by the Defendant, that the evidence on the part of the Plaintiff is incomplete in this, that the letter of attorney under which Stephen Sewell accepted and signed the deed of conveyance from the devisees in trust to the Royal Institution, to which letter a seal is affixed, and the following signature: "The Royal Institution for the advancement of learning by J. Quebec, principal of the said Royal Institution, etc.," being *sous seing privé*, the seal and signature thereto ought to have been proved. It might be a question whether the seal of the Royal Institution does or does not prove itself, (2) but it appears to the court that it is not requisite, under the circumstances of this case, that any decision should be now given upon that point, as we are of opinion that it is immaterial whether the letter of attorney has or has not been proved. It would be as preposterous, in the present action, to require from the Plaintiff such proof of his own letter of attorney, as it would be, in an ordinary case, to call upon him for the proof of his own existence. It is sufficient that the letter of attorney is recognized by the Royal Institution, in now calling on this court to confirm and enforce the deed executed under it by Mr. Sewell in its name, and a more formal recognition could not be made. The deed is brought into court by the Plaintiff, and if enforced it must be according to its tenor, with all the conditions, limitations and restrictions therein expressed. The persons making the conveyance, and others interested in the succession of Mr. McGill, are clearly bound by it, as being in strict conformity to his last will. The only party that could have a right to object to it is the Royal Institution, who have admitted it to be their act, an admission that the Defendant cannot, nor can this court gainsay. The point, however, does not merely rest here, for, long before the institution of this action, on the 23rd day of August, 1820, the Defendant was notified, at the request of the Royal Institution, by notarial protest, that the Institution was ready to receive possession of the property, under the devise and subsequent conveyance made in its favor, and he was thereby required to deliver up the possession. This again, was a solemn and formal recognition of the deed, and consequently of the power given by the Institution to its attorney to accept and sign the same. The principle of law is, that, where there has been no special procuration *ratihabitio mandato comparatur*, (3) and a tacit ratification is sufficient. The Royal Institution has, as far as in its power, actually performed all that by the deed it was bound to do, the highest possible ratification that could proceed from it. One of the conditions in the will was, that the Institution should erect and establish, within ten years from the death of the testator, an university or college, upon the estate of Burnside. Now, in royal letters patent, dated the 31st March, 1821, erecting a college upon that estate to be called McGill College, we find the will recited in the following words: "And, wl.ereas we have been humbly petitioned by the said Royal Institution for the advancement of learning, that we would be pleased to grant our royal charter, etc. The Institution has, therefore, effectually proceeded to the performance of the conditions in the deed, and a more conclusive acceptance or ratification could not be made. After what has fallen from the court on this objection, it is needless to observe, upon the *signature* to the letter of attorney, as it necessarily follows, that if proof of the seal is unnecessary, so that of the signature must also be unnecessary.

3. In the foregoing observations, the court has not noticed the question raised by the Defendant's counsel, as to the validity of the act of ratification

(1) 4 Rép. de Jur., *verbo* conclure, 351, col. 2.

(2) Vide *Moises* vs. *Thornton*, 8 T. R., 307; *Woodmass* vs. *Mason*, 1 Esp., p. 53.

(3) Poth. *Obl.*, n° 75.

trustees has been contested with great pertinaciousness, and several points have been made in the argument, both of the

of the deed of conveyance executed by the lord bishop of Quebec, as principal of the Royal Institution, no doubt, in consequence of the clause in the deed, that the Royal Institution should, within two months from the date thereof, accept and ratify the deed. It is said that the ratification is not valid, as the lord Bishop, in his quality of principal of the Institution, could not have executed it without a special authority from it, and that the act of ratification should have been under the corporate seal of the Institution. The court cannot but express surprise that such a clause was inserted in the deed, as it was executed under a very special and full procuration from the Royal Institution, and the deed of conveyance was complete without it, being in strict conformity to the power given. (1) The head of a corporation may bind the corporation by any contract from which it may derive a benefit, but not otherwise. (2) A more favorable case of this description probably cannot offer than the present is. We cannot presume that the lord Bishop did not, in this matter, act under the authority of the corporation, though no special power has been produced. The subsequent use made of the deed, by the corporation, has made it their act, and operated as a tacit ratification, and the institution has the right to claim the benefits resulting from the deed, as far as they may be found therein legally entitled, as they are bound to perform all and every the conditions and obligations imposed upon them by that deed.

4. It has been urged, by the Defendant's counsel, that the Royal Institution cannot, at present, claim or take from the Defendant the possession of the estate of Burnside, under the devise thereof in the will, inasmuch as the Institution hath not complied with the condition annexed to the said devise, by erecting and establishing, or causing to be erected and established, an university or college, upon the said estate, which it was bound to do within ten years from the death of the testator; until which erection and establishment, the Royal Institution is directed by the will to permit and suffer the wife of the testator, and, in case of her death, the Defendant, to possess the estate, and to receive the rents and profits thereof. The intention of the testator, which the court must always look to and enforce, was undoubtedly to bestow a certain portion of a very ample fortune acquired in this province, for the purposes of education and the advancement of learning therein; and it cannot be supposed, without insult to his memory, that he has annexed such a condition to the devise as to render it nugatory and of no avail. Now, opposite constructions have been given by the parties to the words used in the conditions before noticed, namely, *the erection and establishment of an university or college*; the Defendant, on the one hand, contending that these words imply the erection of a building in which the university or college is to be established; the Plaintiff, on the other hand, contending that they extend only to the erection and establishment of the corporation, or body politic, forming the university or college, and which has been accomplished by the royal letters patent filed in the cause. If the former construction, given by the Defendant, be correct, it is obvious that the main intention of the testator never can be carried into effect, as long as the Defendant, now in possession of Burnside, withholds that possession from the Royal Institution; but if the latter construction be admitted, no impediment offers to the full and entire accomplishment of the will of the testator. The court is, therefore, called upon to discharge a very sacred duty, and, placing itself in the situation of the testator, when he made his will, is bound to explain what has not been fully or clearly expressed therein, supply what may be necessary to complete the sense thereof, and declare and give full effect to that intention which may be otherwise manifest from the general tenor of the will. *Pothier* establishes the following, as a fundamental rule: Les dernières "volontés sont susceptibles d'une interprétation large, et on doit principale-

(1) *Vide* 14 Rép. de Jur., *verbo* ratification.

(2) Kyd, *on corp.*, 312-13.

principal and cross demand. 1. That the legacy is null as having been made in contravention of the ordinance of 1743.

" ment s'attacher à découvrir quelle a été la volonté du testateur ; " (1) and *Bourjon* (2) says : "Le juge du testament est censé être un second testateur " qui développe ce que le testateur n'avait pas suffisamment développé. De " ce principe général il s'ensuit *que si l'expression n'est pas parfaite*, c'est au " juge à suppléer ce qui lui manque, pour lui donner un sens parfait, lorsque " ce supplément parait être l'intention du testateur ; pour cela, il doit se " placer dans la situation où était le testateur lors de son testament," etc.

A testator can annex to a devise or bequest, any conditions he may think proper, and that are not contrary to good morals or any express prohibition of law ; and these conditions must be accomplished : his will is the law to be observed and enforced. At the same time, if a condition be imposed, the accomplishment of which is impossible, the condition fails, and must be put out of consideration, that the main and obvious intention of the testator may not be defeated. *Bourjon* (3) establishes the principle, and adds : " En effet, " il paraît suffisamment par la disposition, que le testateur a voulu gratifier " le légataire ; ce qui doit avoir son effet, indépendamment de l'accomplisse- " ment de la condition, lorsqu'elle est impossible ; autrement, il faudrait " supposer que la disposition est une dérision ; ce qu'on ne peut faire." It is for the court, then, to give that construction to the will which, in its opinion, will effectually meet the benevolent views and real intention of the testator ; and we cannot but think that the construction contended for by the Plaintiff is the most correct and reasonable, and that from the moment the royal letters patent erecting and establishing a college, upon the estate of Burnside, by the name of McGill College, were made and issued, the Royal Institution had a right to enter upon the estate, and that of the Defendant to posses- the same under the will ceased. Inded, if this be not the true construction, one part of the will would be in contradiction to, and destroy the other, which however cannot be allowed, when the intention of the testator can be collected from the will, taken altogether, and *that intention effectuated. Pothier* (4) lays down this rule to be observed in the interpretation of wills : Une " disposition doit s'entendre plutôt dans le sens selon lequel elle peut avoir " effet que dans le sens selon lequel elle ne pourrait en avoir aucun. " And *Cochin* confirms it ; he says : " Car quand une clause est susceptible de deux " sens différens, il est de principe qu'il faut rejeter celui des deux sens qui " est absurde, ou qui rendrait la disposition nulle et caduque, pour se livrer à " celui qui est juste et raisonnable en lui-même, et qui établit une disposition " conforme aux lois. C'est ce que tous les docteurs nous enseignent ; ils veu- " lent que l'on entende les actes dans le sens qui en procure l'exécution, et " non dans celui qui les anéantit. " (5) Besides, if the condition attached to the devise, either in the whole or in part, be itself impossible, it must be rejected, so that the will of the testator may not be defeated. It would have been otherwise if what was evidently an express and clear condition had not been accomplished, and that the ten years had elapsed, within which the university or college was to be erected and established, without any such erection or establishment. The limitation would, in that case, have operated fatally. But this period has not yet elapsed, nor can it be fairly or with any effect urged on the part of the Defendant that negligence and improper delay have occurred ; since the testator, anticipating that difficulties and delay might arise, has thought proper to allow the period of ten years for the accomplishment of that part of his will ; and the delay has operated much to the advantage of the Defendant, by leaving him in the enjoyment of a valuable estate of the benefit of which it is to be regretted that any circumstance should have intervened hitherto to deprive the public.

(1) Traité des Donations testamentaires, vol. VII, ch. VII, sec. 1, p. 412.
(2) 2 Bourjon, 353, *Des Testaments*, ch. VIII, sec. 1, n. 1, 2.
(3) Vol. II, p. 363, *Des Testaments*, part V, sec. 3.
(4) Vol. VI, 4to ed., p. 414.
(5) Vol. IV, pp. 406, 407.

2. That no corporation was in existence, either at the time of making the will, or at the testator's death, and that having

In considering the will before us, and which evidently has been drawn by a professional character of ability, we are upon every fair principle led to adopt the legal import of the words therein used. Now, the word "erect," is equally applicable to a corporation as to a building: the erection of a corporation is the language of the law, and a corporation may exist without that which may be necessary for its accommodation. "The King, it is "said, may grant to the subject the power of *erecting* corporations, though "the contrary was formerly held. But it is really the King that *erects*, and "the subject is the instrument." (1) "But with us, in England, the King's "consent is absolutely necessary to the *erection* or any corporation, and "this consent is given either by act of parliament or charter." (2)—Now, universities and colleges are one of the several species of corporations noticed in the books, and, consequently, must be erected, as all other corporations, either by act of parliament or royal charter; when, therefore, the condition of the divise requires the erection and establishment of an university or college, it does not mean a building, as contended for by the Defendant, but a corporation or body politic, which, however, must have a building for the purposes of that corporation, though the corporation can exist without it. If, indeed, the testator had declared that the possession of the defendant should continue, until an university or college should be built upon the land of Burnside, by the Royal Institution, the intention then would clearly have been what the Defendant contends for; but it is not so expressed; and it may fairly be presumed, if such had been the intention, an intelligent character, as the testator was, assisted by a professional gentleman, would have so worded the devise as to have conveyed that intention. Now, the royal letters patent, erecting and establishing the university or college, in conformity to the will, ordain, "that, upon the said tract of land "called Burnside, and in the buildings thereon erected or to be erected, "there shall be established, from that time, one college at least, to be called "*McGill College.*" What then remains, but that possession of the estate of Burnside should be given to the Royal Institution, to enable them to carry into effect, not only these letters patent, but the intention of the testator, as expressed in his will? It must be obvious that, without this possession, the necessary buildings and accommodations cannot be made and provided, nor the corporation of McGill College proceed to put into operation any of its powers, or organize itself in any manner whatever. It is sufficient that the forms and conditions of the will, as far as it has been possible, and indeed required, have been complied with: a college or corporation has been erected and established upon the estate of Burnside; and, this being done, the Defendant, and now possessor of the estate, can no longer claim any enjoyment thereof under the will, but must surrender it to the Royal Institution, the condition of the devise being thus worded: "And upon condition, "also, that, until such university or college be erected and established, the "said Royal Institution for the advancement of learning do and shall permit "and suffer my said wife, and, in case of her death, the said François "Desrivières, to hold possession and enjoy the said last mentioned tract or "parcel of land, dwelling-house, buildings and premises, and to recover and "receive all and every the rents, issues and profits thereof." It was observed, in argument, by the Defendant's counsel, that the Institution should, in the first place, have asked for, and it would have obtained, possession of a sufficient port of the said land to erect a building for the purposes of a college, until which erection, it could not claim the possession of the whole estate; but we cannot discover upon what principle of law such an argument may be founded. If the Institution is not entitled to the actual possession of the whole, it has no right to any part; the estate devised is an entire thing,

(1) 1 Black Com., 473.

(2) *Ib.*, 471, 472.

no capacity to receive the legacy, it became lapsed. 3. That the erection of a material college, to be called *McGill College*,

and the rights of the parties must be to the entire estate, and not to any particular part thereof. It might easily be conceived what confusion and inconvenience, if not hostility, might be produced by such a divided possession. The observation has, however, been sufficiently answered, by shewing that the Institution is now entitled to full possession; and it is moreover evident that a college may be in complete operation in the buildings now on the estate, as soon as the Institution shall have obtained possession thereof.

5. The main and principal objection, however, which has been raised by the Defendant to the Plaintiff's right to recover in the present action, is that the devisees in trust of the estate of Burnside had never, nor has the Royal Institution, since, obtained from the heir at law of McGill, or from a curator in the absence of such heir, the delivery of the legacy [délivrance du legs] a formality which, it is contended, was essentially necessary to vest the property in the devisees, in trust, and subsequently, in the Royal Institution, and give a right to the latter to the present action. It is, however, contended, on the other side, that the formality heretofore required, is not now necessary, under the existing law of Canada. In nearly all the provinces of France in which customary law prevailed, and which were distinguished from the others by the term *Pays coutumier*, and particularly in the custom of Paris, the law recognized no other heir than the *héritier du sang*, or natural heir, (1) and it was not in the power of a testator to nominate any other, or deprive such heir of the legitime or four-fifths (2) of the *propres*, of which disposal by last will was expressly prohibited; hence came the maxim and rule of law, *Le mort saisit le vif, son hoir plus proche et habile à lui succéder*, (3) the effect of which was, that the possession of the ancestor was continued in the person of the natural heir, who, in contemplation of law, became seized, upon the death of the ancestor, of the general mass of his estate and succession, the object of which was to prevent a violation of the prohibition made in favor of the heir at law, to enable him to secure his legal rights, and to shew, if necessary, that the proportion of the property bequeathed exceeded that of which, by law, the ancestor had a right to dispose by will, to the prejudice of his heir at law; and the heir being so seized and possessed, it was necessary that all legatees, under a last will, should, in the first instance, before they could take possession of, or exercise any right over the property devised or bequeathed, apply to the heir, and obtain from him, either by a suit at law or otherwise, what was termed, *délivrance du legs*, to vest in the legatees the property so devised and bequeathed to them. (4) Such, certainly, was the law of Canada, until the passing of the act of the 14th Geo. III, ch. LXXXIII, commonly called the Quebec Act, whereby the policy of the ancient law of France, in force in Canada, for the preservation of estate in families, became changed, and the article of the Custom of Paris, which restricted the disposal of property by last will, was abrogated, and an entire freedom given to the owners of property to dispose by will of the whole thereof, without reserve, even to the prejudice of the heir at law, should such owner see fit. As, in the construction however of this act, and as to the effect of the clause before recited, some difference of opinion arose, a declaratory Act was passed in the Provincial Parliament, (5) to explain and amend the former. If any doubt could be entertained under the first act, no difference of opinion can, under this last prevail, inasmuch as a full, clear and decided power is given to dispose by will of an entire estate, and to such person and persons as

(1) Dic. de droit, II vol., page 51.—Institution d'héritier.

(2) 292, *art.* Custom of Paris.

(3) 318, *art.* Custom of Paris.

(4) See Pigeau, I vol., 63; II vol., 393, 394 and 398.

(5) 41 Geo. III, ch. IV, sec. 1.

on the land of Burnside, within ten years after the testator's death, being a condition precedent to the legacy's attaching,

the owner may see fit, to the exclusion of the heir at law ; and when this is done the heir cannot claim any *saisine* of the property of the succession, inasmuch as the right of the heir upon which that *saisine* was established, has, by force of the statutes before noticed, and by the will of the testator, been destroyed. It is evident, from all the authorities, that the consideration, which, in customary France, was had to the claims of blood and of nature, rather than to the disposal of property by last will, and the recognition of no other heir than the *héritier du sang*, gave rise to the maxim of *Le mort saisit le vif*, and to the necessity of resorting to the heir for the delivery of the legacy ; therefore, where this maxim does not apply, we must conclude that the *demande en délivrance du legs* is not necessary ; the reason of the law failing, it can no longer operate, and it becomes an useless and unnecessary formality, having neither law nor reason to support it. Indeed, it would be absurd to suppose that he could be called on for the delivery of that in which he never had any existing, but only an expectant right, and where he has been deprived of every claim he might, without the will, have had in the succession of the testator ; to what end then call upon the heir to deliver that over which he has no control, and which would be rather a mockery than otherwise, and an insult to him whose ancestors had deemed unworthy to particicipate in his succession. (1) " L'Institution d'héritier n'ayant pas lieu par testament, tout legs soit universel soit particulier, est sujet à délivrance, " and, from this authority, we may conclude that the formality would not have been required, in customary France, had the right of nominating an heir been there allowed. Now, it is evident that, if, by virtue of the statutes before noticed, the blood heir may, by last will, be excluded from the succession, the *Institution d'héritier* must, in effect, exist, in this country, as it did in the Roman Law, and, as admitted in some few of the customary provinces, and, in those provinces which were governed by the Roman law *(pays du droit écrit)* now, in those customs and provinces, the " délivrance du legs " was not required, inasmuch as the testamentary heir, and not the heir at law, became seized, upon the death of the testator ; and, in those customs which preserved the usage, in regard to testamentary heirs (Institution d'héritier), the maxim of *Le mort saisit le vif* was equally applied to the testamentary, as to the heir at law, and, consequently, the " délivrance du legs " was not necessary to vest the succession in the testamentary heir. In the following authority (2), those customs and the principle now stated will be found. " Il y a, au contraire, d'autres coutumes qui ont conservé l'usage et l'effet des Institutions testamentaires, celle de Bordeaux, art 74, porte *Le mort saisit le vif, en quelque manière qu'il succède, par testament ou sans testament.* Celle de Berry, tit. XIX, art. 28, s'exprime à peu près de même : *Le mort saisit le vif, son plus prochain héritier, habile à lui succéder ab intestat, et aussi son héritier testamentaire.* La coutume du duché de Bourgoyne, ch. VII, art. 4, dit, que : *si le testateur dispose de deux parts de ses biens....: en sont saisis, ceux qu'il aura institués* héritiers par son testament valablement fait, et selon raison. Celle du comté de Bourgoyne, chap. III, art. 1, n'est pas moins précise : *Le mort saisit le vif, son héritier testamentaire institué en testament* solennel ou nuncupatif. " Also, in the *Dictionnaire de droit*, II vol., 51, *tit.* Institution d'héritier : " c'est aussi une question si l'héritier testamentaire est saisi ; dans quelques coutumes où l'institution de l'héritier a lieu, il est saisi comme celle du duché, et du comté de Bourgoyne, de Burg et de Bourdeaux. " It is, therefore, clear, that, in these customs, the testamentary heir was seized, without the necessity of a " demande en délivrance de legs " upon the heir at law, inasmuch as the maxim of *Le mort saisit le vif* equally operated as to both, and which maxim alone could render necessary such a formality. " La nécessité de la demande en délivrance de legs soit universels soit particuliers, est fondée, en pays coutumiers, sur ce qu'en vertu de la max-

(1) 2 Bourjon, p. 329.

(2) Rép. de Jur., 2, Institution d'héritier, 309, col. 2.

and no such college having been erected within the said period, the legacy had become utterly defeated and determined.

ime, *Le mort saisit le vif*, les héritiers du sang sont saisis de plein droit de tous les biens de la succession, à l'instant de la mort du défunt. " (1) If, then, the existing law of Canada gives a power to the owner to dispose by will, of the whole of his estate, it necessarily follows that he has a power to nominate an heir to the exclusion of the natural heir or *héritier du sang*, it is in effect giving the power to a testator to do that which, as well in the Roman law as in certain provinces of France was allowed and called *Institution d'héritier*, and this without observance of the forms which by these laws were required in the exercise of that power. Now, in the case before us, the whole of the testator's property has, by his will, been devised to different persons and for various purposes, and, if any heirs exist, they are completely excluded, having no portion of the general mass reserved to them. To be seized of any property, there must be an existing right to some extent or other, in or over that property. Here, the heir has none, and it would be a subversion of common sense, and, consequently, of law to recognize in him any *saisine* in the property composing the succession of the testator. In the custom of Paris, the power of nominating an heir, or the Institution d'héritier, by last will, was not recognized, the *héritier du sang* alone was considered the heir, and those claiming under a will were called legatees, but, with that title, the former had something to support it, he was substantially and legally the heir, as the "légitime" reserved to him by the custom could not be diminished by the will of his ancestor. "Une hérédité se défère de deux manières, par la volonté de l'homme et par la disposition de la loi." (2). Now, by the statutes before cited, an entire freedom of disposing, by last will, of the whole of the property of the testator is given without restriction or limitation, it, therefore, necessarily follows, that the power so given must be complete and free in its execution, and the will must alone be considered the law to be observed in the disposal and distribution of the testator's property. It precludes the necessity of resorting to any other, or to that disposal which the law has provided in respect to intestate estates. The legal succession must give way to the testamentary, and the property must receive its destination "par la volonté de l'homme," and not "par la disposition de la loi." By the statutes, then, a power is given to testators to an extent which was not known in the Roman law, or in that of France, (except in the early period of the former) or in those provinces of France where the Institution d'héritier was allowed, and, if so, the restrictions imposed by the ancient law of Canada, in regard to the disposal of property by last will, must be considered as entirely removed, and there must be also an exemption from those formalities which were observed and required, where an Institution d'héritier was allowed. Now, where this last existed, it has been shewn that the "délivrance du legs," by the heir at law, was not required, inasmuch as the testamentary heir, and not the heir at law, became seized, upon the death of the testator, and, if a more extensive power and freedom in the above respects exist, in this province, a greater freedom and less restriction must exist in the execution; particularly, in regard to this succession, where the heirs at law, if any there be, have been, by will, excluded from any share thereof, and which exclusion is authorized by law. It is not necessary to give any opinion as to the change which has thus been made of the ancient law of Canada, or, whether the same was wise or otherwise, it is sufficient to say that the consideration for and favour shewn to the *héritier du sang*, by the ancient law, has ceased to prevail, and the consideration to the claims of blood and nature must be left to the discretion of the testator alone, whose will, disposing of his property, is now, and must be alone the law to govern this court, and all persons concerned in the testator's estate, in regard to the disposal of the whole thereof. Notwithstanding, however, the policy

(1) L. C. Den., *verbo* délivrance de legs, 161, sec. 1, § 2.

(2) 9 Répertoire, *verbo* Institution, p. 307.

4. That the object of the bequest, namely, the erection of the college within the period prescribed in the will, having be-

of the ancient law of France to favor the heirs at law, héritiers du sang, and thereby preserve estates in families, yet, it was not so unjust as to withhold from the testator the power of disinheriting the legal heir, for certain just and necessary causes, such as unnatural conduct, and cruelty on the part of such heir, in which case the exheredation had the effect to deprive the heir of the *saisine* given him by the 318th article of the Custom of Paris; the existing law gives this power to disinherit in a more ample manner by granting an entire and uncontrolled liberty to dispose by will, and it is not necessary that the intention to exclude should be particularly expressed, or any cause assigned for it, as all is left to the sole discretion and will of the testator; it is sufficient if, by the will, it appear, that he has disposed of all his property in favor of persons not his heirs at law. L'exhérédation fait cesser la règle contenue en cet article (*Le mort saisit le vif, etc.*), de même que la renonciation aux successions des père et mère, qui se font par les filles par leur contrat de mariage. (1) It must not be concluded from any thing that has fallen from the court, that it considers the maxim or article of the Custom, *Le mort saisit le vif*, etc., as now entirely without effect in Canada, but only to except from its operation those cases where a disposal by last will and testament has been made, to the entire exclusion of the legal or blood heir. We are called upon to decide only the case before us, and not upon cases which may be differently circumstanced, and to which the reasons given in support of the present judgment may not altogether apply.

The court was not disposed to withhold its opinion upon this important point raised in argument, and so much insisted and relied upon by the Defendant's counsel, though it was not perhaps essential to have gone into the question, so far as we have done, for it does not appear to us that the objection, under all the circumstances of this case, could correctly be urged on the part of the Defendant, or that he could, under the ancient law, have availed himself thereof, and it is to be observed, that he has not made it a special ground of exception, and not directly put the question in issue; but there is a more substantial ground, the Defendant is not the heir at law of the testator, and consequently has no right but what he has required under the will; he also is a legatee, and if the law he invokes is now that of Canada, it must operate against him, as well as all the other legatees, and his possession of the estate of Burnside must be declared an illegal one, but he cannot be allowed thus to destroy the title of the Plaintiff, by the destruction of his own, nor do we suppose he is very desirous of doing so, and, as the possession which he now has of the estate of Burnside, is most clearly derived from the will, for, without it, he has not a shadow of title, it must be presumed that he has legally obtained the delivery of it from the heir or a curator, or from the devisees in trust, under the will; if, from the former, it is undoubtedly under the will he has received it, and the right given, or formality required by the ancient law, has been exercised and complied with, and not necessary to be repeated; and, if from the latter, in conformity with the will, the Defendant's possession is that of the devisees, who being once in possession, the "demande en délivrance" would not be necessary, *quoad* third persons subsequently coming into possession thereof, and the heir would be left to exercise his right, but as the case stands before us, we must presume that the possession of the Defendant has been obtained, from the devises in trust, as such was the direction of the will, under which alone he could hold the possession, and which he cannot now continue to hold contrary to the terms of the will, which is his only title; he is not then the tiers détenteur, inasmuch as he has no possession, but by the sufferance and permission of the trustees, in conformity to the will. If, indeed, the Defendant had set up a counter title to the property, the fair and legal presumption which must now exist, would have ceased, but no attempt

(1) 4 Gr. Cout., 765. Som., § 8, n. 1.

come inoperative, the Appellant was entitled to retain the £10,000, as the special and substituted legatee under the will.

of this kind has been made, and, of course, he has none to produce, his possession was in the origin that of the devisees in trust, subsequently that of the Royal Institution, and he cannot avail himself of his now possession to contest the title of the Plaintiff, upon the ground that they, who we must presume put him in possession had not legally obtained a surrender of it from the heir at law, of the testator. *Illud à veteribus præceptum est, neminem sibi ipsum causam possessionis mutare posse ;* " celui qui a la possession, ou même la nue détention d'une chose, non plus que ses héritiers, par une simple destination, ni par quelque laps de temps que ce soit, ne peut changer la cause ni les qualités de sa possession ou détention, *tant qu'il paraît aucun titre d'acquisition.*" (1)

6. It has been urged that, by the declaration of the King of France, in 1743, (2) enregistered in this country, the bequest of McGill was a nullity, being contrary to the provisions of the declaration, and, perhaps it might have been so considered, if the Provincial Statute of the 41st Geo. III, ch. XVII, had not preceded the bequest, and the bequest had not been made in conformity, and with a view, to that statute. It is not necessary now, particularly, to notice the prohibitions which that declaration contains, the spirit and intention of which was not to benefit heirs, but, upon sound principles of public policy, to prevent the establishment of corporations without the express and particular permission of the Sovereign, and, also, to prevent corporations legally established, from obtaining too much favor and influence, by extensive acquisitions, beyond the object of their creation. It will be found that the same policy prevails in the law of England, for, there, no corporation can exist without the consent of the Sovereign ; and corporations are restricted in their acquisitions. But this declaration of 1743, cannot be brought to bear upon a case which stands upon its own peculiar law. The Provincial Statute of the 41st Geo. III, with a view to provide in the most extensive and liberal manner for the education of the rising generation in Canada, has erected the corporation of the Royal Institution, to which the bequest in question has been *since* made, and, in the 2d section, has declared that the said Institution should be capable in law, to " purchase, take, " have, hold, receive, enjoy, possess and retain, without licence in mort- " main, *all* messuages, lands, tenements and immoveable property, monies, " goods, chattels and moveable property which hereafter shall be paid, given, " granted, purchased, appropriated, *devised* or bequeathed, in any manner " or way whatsoever, for and in favor of the said *Schools and Institutions of* " *royal foundation.*" This statute which has received the sanction and approbation of our Sovereign, is of greater and higher authority than the *declaration* relied on by the Defendant, and has evidently repealed or destroyed the effect of the latter, so far as concerns the corporation of the Royal Institution created by the statute. The testator, therefore, so far from violating the law, has contributed his mite, to forward the enlightened and liberal views of the legislators, towards the youth of Canada, and nothing remains but to give effect to the bountiful bequest of McGill, that his memory may be respected as it deservedly ought, by all classes of His Majesty's subjects in this province. If this had been a case of a corporation erected by royal letters patent alone, the declaration of 1743, might then have been resorted to, with more effect by the Defendant, for, although the King, by his prerogative, can erect a corporation, yet he cannot give it forms and privileges contrary to the general law of the land. (3) To obtain these powers and privileges, or to be exempted from general restrictions, recourse must be had to the aid of an act of Parliament, that aid has been obtained, in regard

(1) Poth., *Possession*, nos 31, 35.

(2) 1 Edits et Ordonnances, p. 537.

(3) Kyd, *on corporations*, 6.

As to the first ground of objection, whatever might have been the effect of the ordinance of the French King of the

to the corporation of the Royal Institution, whereby it has been authorized to take and receive without limitation or restriction, all real and personal property which should, after the passing of the act, be devised or bequeathed to, and in favor of schools and institutions of royal foundation. The old law must consequently give place to the new, which last being beneficial to the public, must be expounded liberally and without restriction.

7. It has been further contended that the corporation of the Royal Institution had no legal existence at the period of the devise of the testator, and, on that account, the bequest by him made became null and void. This is evidently one of those objections which, if founded, is in direct opposition to, and necessarily defeats the manifest intention of the testator, as expressed in his will, and deprives the public of his bounty, the devisees in trust named in the will being directed to convey the estate of Burnside to the Royal Institution *established* or *to be hereafter established* ; the meaning of which must be, that if at the time the bequest was made the Royal Institution could not then be considered as established, the conveyance was to be made whenever it should thereafter be established. It may be admitted, that if, by a will, an *immediate* devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void, even if the corporation were afterwards created, without some special and express law to take the case out of the general principle ; but, in the present case, there can be no doubt that the corporation of the Royal Institution was created by the statute of the 41st Geo. III, (the words of the 4th clause are : "The said corporation hereby erected,") and nothing remained but that the Crown should nominate the trustees and members thereof, the consent of the Crown to the erection of the corporation was evinced by the royal sanction given to the statute; and it was, therefore, erected before the testator made his will, though not complete or in operation until the subsequent nomination of the trustees or members thereof. It must be allowed that the powers of Parliament are unlimited, as to the making of new laws and abrogating or modifying old ones. Now, by the second section of the statute, it is enacted, that the Royal Institution shall take, have and enjoy, *without licence in mortmain*, all lands, money and goods which *thereafter* should be devised or bequeathed, in any manner or way whatsoever *to and in favor of the said schools and institutions of royal foundation, to and for the purposes of education and the advancement of learning.* And by the third section of the statute, it is further enacted, that all property which should thereafter be devised or bequeathed, in any manner or way whatsoever, for and in favor of the said schools and institutions for the purposes of education, etc., should be, and the same was thereby vested in the trustees of the *Royal Institution.* Subsequently to this statute, by the will of McGill, a bequest is made of the estate of Burnside to certain devisees therein named, in trust, to convey the same nominally to the Royal Institution, but, in effect, to and in favor of one of the objects contemplated by the statute ; and it was not necessary that the trustees or members of the Royal Institution should have been nominated at the time of the death of the testator to give effect to this bequest, inasmuch at it was not necessary, under the statute, that the Royal Institution should have been named in the will, as the bequest, coming within the description of those mentioned in the statute, would become vested in that Institution by the effect and operation of the statute alone, inasmuch as the word *hereafter*, used in both the clauses before alluded to, necessarily implies all devises and bequests made from and after the passing of the statute; it would, however, have been otherwise if, in *lieu* of the word *hereafter*, the following words had been used : "From and after the nomination of the said trustees or members of the said Royal Institution." The bequest, therefore, is not a nullity on the ground now contended on the part of the Defendant, inasmuch as it is supported and authorized by the statute, and the will of the testator can be complied with. Having, then, the support of the statute and the sanction of the Crown, the case becomes a stronger one in favor of the

year 1743, the Provincial Statute of the 41st of His late Majesty, granted full power to the governor, by an instrument

Plaintiff, when for a legitimate, beneficial and general public object a bequest is made, as in this case, to devisees in trust, persons in being and capable of recovering; and it does not lapse, as in the case of a devise to a corporation not having any legal existence.

8. It has been also contended, on the part of the Defendant, that the letters patent filed, having established a college of *royal foundation*, the conditions of the devise and bequest and the intention of the testator have not thereby been complied with, and the intention of the testator conformed to, inasmuch as the testator's will, it is said, provides for a college of *private foundation*. In deciding upon this point, the court must be, as it has been, in regard to others, governed by the intentions of the testator, as expressed in his will. There can be no doubt that the testator, in his life time, might, if he had thought fit, have applied for, and the King in virtue of his prerogative, might have granted to him a licence to erect a corporation or college, and to endow it with possessions or revenues, in which case, the donor would have been considered in law, the founder; but this does not appear by the will to have been the object of the testator, as from the whole tenor of the bequest, he evidently contemplated a college of *royal foundation*, whatever merit he might, and to which he was so justly entitled, from his very liberal bequest, with the additional honor of having one of the colleges distinguished by his name. By the Provincial Statute of the 41st Geo. III, before noticed, a corporation was established, under the name of The Royal Institution for the advancement of learning, to be composed of certain persons to be named by the governor, etc., to be trustees of the schools of *royal foundation* in this province, and of all other institutions of royal foundation to be thereafter established for the advancement or learning. The corporation of the Royal Institution was, therefore, of royal foundation, and its powers and duties extended only to schools and institutions of *royal foundation*, for the superintendence and management of which it was *alone* created, and to which it must necessarily be confined, having no power beyond these, under the statute of incorporation. The testator, with a perfect knowledge of the statute, by his will, gives and devises his estate of Burnside to certain devisees, in trust, to convey the same to the Royal Institution, constituted and established under and by virtue of an act of Parliament, upon condition that the said Institution should erect and establish, or cause to be erected and established an university or college upon the said estate. Now, such university or college could only be, under the statute, one of royal foundation, and this must have been contemplated by the testator, who has referred to that statute, constituting and establishing the Royal Institution, and fixing its powers and authority, and it is, therefore, obvious that he intended that a Royal College should be established under the authority of the statute, and his bequest in effect amounts to no more than this, if the Royal Institution, sanctioned by my sovereign, will establish or cause to be established an university or college on my estate of Burnside, to forward the views of the Provincial Parliament, as expressed in the statute of the 41st Geo. III, I will give that estate and £10,000 towards that object. The testator then is, in truth, the benefactor, but not the founder, a suggestor of a particular object of the general system of education provided by the statute, to the execution of which he was desirous to contribute, and has given a very liberal proportion of his fortune. It cannot take any thing from the merit of the testator, if he should not be considered the first donor or benefactor to the institutions for the advancement of learning, or that, in this respect, he should have been preceded by his sovereign, who, as it is expressed in the preamble of the statute, had been graciously pleased to signify his royal intentions that a suitable proportion of the lands of the Crown should be set apart, and the revenue thereof appropriated to such purposes. In private foundations, the funds appropriated are sufficiently ample for the support thereof; but this is not the case in the present instance, for it is obvious, liberal as the donation is, that it is, and was so considered by the testator, insufficient to provide for the erection

under the great seal of this province, to establish free schools for the advancement of learning, and declared that the trustees and their successors, to be named as therein directed, shall be a body corporate and politic, by the name of *The Royal Institution for the advancement of learning.* This provision of the statute by giving such licence to the governor, completely does away with the ancient law in this respect, and renders this ground of objection unavailable.

The second ground of objection is also untenable, for, though it is admitted that a legacy is lapsed (*i. e. caduc*), when left to an individual, or to a body politic or corporate, not *in esse*, yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, so soon as it should please the provincial government to give to "airy nothing a local habitation and a name." This mode of settlement, by appointing trustees to preserve contingent remainders was devised by Sir *Orlando Bridgman*, and other eminent lawyers, during the time of the civil wars in England, after the death of Charles the first, and these gentlemen maintained and enforced it after the restoration, from which period it has been the prevailing mode of conveyance. It was to that expedient the testator resorted, to carry his will into effect, and it would ill accord, either with the principles of French or of English

of the university or college, and the support of such an establishment. This being the case, independent of the considerations before stated, the principle of law is, that if the King, and a common person, give possessions to a corporation at the same time, on its original creation, the King (1) by his prerogative shall be the founder. Many reasons might be offered to shew that the view now taken, was that of the testator, and it cannot but produce a higher tribute to his memory, from the consideration that he should have adopted such wise and effectual measures to secure to the inhabitants of this province, the benefit he intended them, by placing it under the secure and fostering protection of a liberal and enlightened government, which can have but one ruling principle, the real welfare and prosperity of its subjects, and not leaving it in that precarious state, where from private interest, the object intended might be defeated. It has been said that the college in question was an individual object unconnected with the general system, but upon every consideration, and, bound as we are to give a faithful interpretation to the will of McGill, we feel ourselves justified in saying that it was only to effectuate part of a general plan which had been preconceived and provided for by the legislature, and cannot be separated therefrom, without destroying the very foundation and root of the bequest rendering it a nullity, and defeating the manifest intentions of the testator.

Judgment for the Plaintiff. (2)

(1) Kyd, *on corporations*, vol. II, p. 51.

(2) This judgment rendered in the Court of King's Bench, at Montreal, on the 19th day of October, 1823, was affirmed in the Provincial Court of Appeals, on the 28th day of November, 1825; and before His Majesty, in his privy council, on the 7th day of May, 1828.

law, were this court to lay down a rule which would defeat his intentions plainly manifested in his will, by the words " constituted or to be constituted." But this mode of settlement was perhaps unnecessary to give effect to the bequest, for it was a rule of law, recognized and confirmed in the case of Sutton's hospital, that " a thing which is not *in esse*, but in apparent expectancy, is regarded in law ;" and the erection of free schools, under the licence granted by the 41st Geo. III, was a measure of which there was then an apparent expectancy.

The third ground of objection requires a more minute examination, as holding a specious ground of defence; and, in order to give full effect to the answer to this objection, it is proper to refer to the words of the writ of privy seal, dated the 1st March, 1821, by which His Majesty ordains and grants, that, upon *the land and in the building*, described in the testator's will, *there shall be established from this time one college, at the least, for the education of youth and students in the arts and faculties, to continue for ever, and that the said first college to be erected thereon shall be called McGill College.* The legal effect of these letters patent was to convert the buildings and land appertaining to them into *McGill College* in *intendment*, which (in the quaint language of lord Coke) is all that sufficeth." The college was thereby called into a corporate and political existence, and all the benefits and advantages contemplated by the testator in making his bequest of this money, attached to it in as great a degree as if the fabric had been originally raised and fitted up for the purpose of a seminary for the education of youth. This principle was laid down in the case of Bridewell's hospital, in queen Elizabeth's reign ; nor was it then a principle newly received, for, so early as the reign of Henry the fifth, it was held that " a " void place or soil in which a house is intended to be built, " may, by the King's charter, be named a house ; and this " nominative house shall be sufficient, as there it was, to sup- " port the name of an incorporation." In Camden's *Britannia*, 311, it is shewn (says lord Coke, in the case of Sutton's hospital), " that a void place, to support the name of a corpora- " tion, may, by the King's charter, be named an hospital, or " temple ; and it is not requisite that there be always truth " in the name of the incorporation, either of an hospital or of " any other body politic." There is a variety of instances referred to in the same report, as that of the Knights Templars of St. John of Jerusalem, and the Savoy hospital, in which, though neither the fabric of the temple or hospital was founded and built, yet the King's *intendment*, so expressed in the charter, created a body politic and corporate.

The fourth ground of objection, that the object of the bequest, namely the erection of the college, within the ten years prescribed in the will, having become inoperative, the Appellant is entitled to retain the £10,000. This is disposed of in the answer to the third objection. But if any doubts could be entertained that His Majesty's charter alone did not virtually give an existence to *McGill's College* as a body politic capable of receiving this bequest, this is an objection which is the more ungracious as coming from the lips of one who, after having participated so largely in the bounty of the testator, is himself the guilty cause that an edifice has not been actually founded and built on the lands of Burnside. To him who has wrongfully detained the property, the maxim of law cited at the bar, "*In omnibus causis pro facto accipitur id, in quo per alium mora fit, quo minus fiat,*" applies with great force. The Royal Institution having done *quantum in illa fuit* to raise an edifice in stone, and having been prevented from building it, by the refusal of the Appellant to give them possession of the land, the Respondents are, in law, placed in the precise situation they would have stood, had they literally carried into effect the testator's will, and erected the walls and fitted up the buildings for the reception and accommodation of scholars.

There were other grounds of defence urged in the court below, such as the Royal Institution, on its original creation had no head, and that there was no royal licence to take in mortmain; but these are also unavailing, inasmuch as the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries without a head, and the governors of Sutton's hospital have no president or superior, but are all equal in authority; so were, at least, the greater number of corporations. As to a licence in mortmain, if, to the Royal Institution, whenever it should be created, an express licence had not been granted by the 41st Geo. III, and the power had not been given to the corporation, in their charter, to take and receive moveable and immoveable property in mortmain, still the royal grant of the 31st March, 1821, erecting *McGill College* into a body politic, having recited the bequest of the late Mr. McGill as the cause moving His Majesty to grant the charter of incorporation, must be held equivalent to an express licence to take and receive in mortmain; and, besides, it may be observed, that the statutes of mortmain (which are a part of the public law of the province) make no mention of personal property, and, therefore, the powers of corporations aggregate in general to take such property remains unlimited.

On every ground, the court is of opinion that the judgment of the court below ought to be confirmed, and it is confirmed accordingly, awarding to the Respondents the sum demanded, with costs. *(Stuart's Rep.*, p. 218.)

EXTRADITION.

COURT OF KING'S BENCH, Montreal, 20th June, 1827.

In the case of JOSEPH FISHER.

Held: That the executive government may deliver up to a foreign state, for trial, any fugitive from justice charged with having committed any crime within its jurisdiction. (1)

Joseph Fisher, an alien, came lately into this province, where he was arrested, about the 10th of May last, at the suit of one John Wood, a merchant in the state of New Hampshire, for a debt of £160, and was, thereupon, detained in the gaol of this district. On the 28th of the same month, two warrants, signed by a police magistrate, were lodged with the keeper of the same gaol, the one charging the said Joseph Fisher, as late of Vermont, gentleman, of " being accused, on " oath, with having feloniously stolen, taken, and carried " away, from a trunk previously locked, bank notes, to the " amount of 638 dollars, the property of John Wood ; " and directing the detention of the said Joseph Fisher, in the said gaol, to be dealt with according to law. The other warrant being somewhat more extended and precise, stating, " that, " whereas Joseph Fisher, late of Vermont, gentleman, an alien, " to wit, a Prussian, now in confinement, under civil process, " in the said gaol, stands charged, upon oath, with having, at " Middlebury, in the state of Vermont, feloniously stolen, " taken, and carried away, from a trunk, previously locked, " bank notes, to the amount of 638 dollars, and to the num- " ber of 240, the property of John Wood, of Keene, in the " state of New Hampshire, and with having, immediately, " upon the commission of the said felony, come into this " province, " and directing also the detention of the said Joseph Fisher, to be dealt with according to law. These warrants were founded on two depositions made by the said John Wood, on the said 28th of May last, in one of which the stealing of the bank bills or notes, to the amount of 638 dollars, is mentioned, but without stating the time or place where the felony was committed, and that the said John Wood

(1) V. le ch. CXLII des Statuts revisés du Canada.

verily believed the said felony to have been committed by the said Joseph Fisher; but, in the other, it was sworn, " that " the said Joseph Fisher committed the crime and felony " charged in the affidavit aforesaid, at Middlebury, in the " state of Vermont; that the said Joseph Fisher is not an " English subject, but an alien, to wit, a Prussian, as declared " by him, the said Joseph Fisher, and came into this pro- " vince, from the state of Vermont aforesaid, immediately " after the commission of the aforesaid offence." It further appeared that the offence, so charged against the said Joseph Fisher, is a felony and a crime punishable by the laws of the state of Vermont. On the 30th day of the month of May last, a warrant was issued, in the name of our sovereign lord the King, tested in the name of, and signed by His Excellency the earl of Dalhousie, the governor in chief of the province, addressed to the sheriff of the district of Montreal which is as follows:

" *Whereas* Joseph Fisher, late of the town of Middlebury, in the county of Addison, in the state of Vermont, one of the United States of America, gentleman, is now committed and detained in our common goal, in our said district of Montreal, under your custody, upon and by reason of a certain charge on oath of felony, to wit, upon the charge on oath, of having, on the twenty-third day of April, 1827, at the said town of Middlebury, in the county of Addison, in the state of Vermont, one of the United States of America, feloniously stolen and carried away divers, to wit, 240 bank notes, for the payment of divers sums of money, in the whole amounting to 638 dollars, of the value of £143 11s. sterling money of Great Britain, and then and there being the property of one John Wood. And, whereas the said Joseph Fisher, not being one of our subjects, but being an alien, to wit, a Prussian, has, since the commission of the said offence, come into this province, from the said United States of America, and the said offence whereof he is charged as aforesaid, having being committed within the jurisdiction of the said state of Vermont, it is fit and expedient that the said Joseph Fisher be made amenable to the laws of the said state of Vermont, for the offence aforesaid. We, therefore, command you, that the body of the said Joseph Fisher, under your custody as aforesaid, you do immediately convey and deliver to such person or persons, as, according to the laws of the said state of Vermont, may be lawfully authorized to receive the same, at some convenient place, on the confines of this province, and of the said state of Vermont, to the end that the said Joseph Fisher may be thence safely conveyed, by such person or persons, as aforesaid, to the town of Middlebury aforesaid, and there be made to answer for the offence aforesaid, according to the laws of the state of

Vermont. Provided always, that the said Joseph Fisher be detained under your custody aforesaid for no cause, matter or thing, other than the offence aforesaid ; and this you are not to omit, at your peril. "

Under these circumstances, an application was made for a writ of *habeas corpus*, which was allowed, and, upon the return it appeared that the Applicant, Joseph Fisher, was in the custody of a sheriff's officer, who was about executing the warrant directed to the sheriff.

REID, CH. J. : Several questions have been raised, and objections taken on the part of the prisoner, as to the sufficiency aud legality of the proceeding against him. These we shall now consider. It is objected, 1. that there is no clear and positive charge of any felony or crime having been committed by the prisoner; the charge against him amounting merely to a suspicion, the grounds or causes of which are not set out, so as to enable the court to judge how far they are reasonable or sufficient. It cannot be supposed that much stress was meant to be laid upon this objection, as, in the affidavit of John Wood, there is a positive charge against the prisoner, *that he committed the felony in question, at Middlebury, in the state of Vermont*, and so expressed in the warrant of commitment. It was no doubt necessary that the charge against the prisoner should be sufficiently clear and positive to render him amenable to the laws of that country he is stated to have violated, for this constitutes the ground-work of the whole proceeding. The court, however, thinks the accusation against the prisoner to be sufficiently clear and positive in all material points. It is true that the day when the felony was committed is not mentioned in the affidavit of Mr. Wood, although it is in the warrant addressed to the sheriff ; but, from the circumstances stated of the prisoner's coming into this province immediately after the felony was committed, and his subsequent arrest here, in May last, this would be sufficient to hold him amenable to the law ; the omission of a positive day or date being in many respects not so material.

2. That, if a sufficient charge of a crime be made out against the prisoner, yet the Sovereign cannot lawfully deliver him up to the state where the crime is said to have been committed, and, even, allowing, this right to the Sovereign, yet that it has never been practised or allowed, except in offences of the most aggravated nature, such as murder and robbery, but never in the minor offences of larceny and such like.

This objection embraces the main points in the case, and the determination upon it, will, in a great measure, obviate all the other objections. In considering this part of the case, much of the argument used must be laid out of the question,

such as that founded on offences of a political nature, arising out of revolutionary principles, excited in any government, as, in these cases, the refusal of a state to surrender the accused cannot be drawn into precedent, for the authority of the state to which the accused has fled may well be extended to protect rather than deliver him up to his accusers, and this, upon a wise and humane policy, because the voice of justice cannot always be heard, amidst the rage of revolution, or when the sovereign and the subject are at open variance, respecting their political rights ; and, therefore, no state will ever be induced to deliver men up to destruction, nor even to malicious prosecution. We will, also, lay out of the question all the cases depending upon treaties and conventions entered into between different nations, as, in such cases, the surrender of the accused, by one nation to another, is not so much the effect of the exercise of a prerogative right or power of the executive governement, as the execution of a national convention binding on both parties. We must meet the case as it presents itself, which calls upon us to determine, whether, for any crime, great or small, committed in a foreign state, there exists in the executive government of this country any authority to deliver up the accused, to be dealt with according to the offended laws of such foreign state. The crime charged against the prisoner is recognized as an offence against the laws of all christian and civilized nations, and this crime may be moreor less aggravated, according to the circumstances of every particular case. In looking at the authorities cited from *Grotius*, *Puffendorf*, *Vaitel*, *Heineccius*, *Burlamaqui* and *Martens*, and to what has been written by them on this subject, we feel it unnecessary to make particular quotations from them, in support of the doctrine in hand, because it is impossible that any unprejudiced man can read these authors, without being satisfied that the principle here objected to, stands admitted as a thing understood, practised, and recognized by the comity of nations, that the offender against the laws of one nation, taking refuge with another, may be surrendered to the offended nation, for the ends of justice. The difference of opinion, among these writers, as to the enormity of the offence, cannot affect the principle, although it may vary the practice, among different nations, according to circumstances. This right of surrender, is founded on the principle, that he who has caused an injury, is bound to repair it, and he who has infringed the laws of any country is liable to the punishment inflicted by those laws; if we screen him from that punishment, we become parties to his crime, we excite retaliation, we encourage criminals to take refuge among us. We do that, as a *nation*, which, as *individuals*, it would be dishonorable, nay, criminal to do.

If, on the contrary, we deliver up the accused to the offended nation, we only fulfil our part of the social compact, which directs that the rights of nations, as well as of individuals, should be respected, and a good understanding maintained between them ; and this is the more requisite among neighboring states, on account of the daily communications which must necessarily subsist between them. A modern writer (1) on the laws of nations, says: " La communication journalière " entre deux païs limitrophes est inévitable, et elle doit être " d'autant plus favorisée par leurs gouvernements respectifs, " qu'elle est naturellement fondée sur des besoins réciproques, " et qu'elle donne par là, lieu à des changes, d'ailleurs, elle éta- " blit entre les habitants respectifs des liaisons, et une sorte de " confiance qui assurent leur tranquillité, et contribuent à leurs " jouissances. " Indeed, were we to take into acconnt the opinions of modern writers on international law, we would be still more strongly fortified in the principle we here hold, and we see no reason why those opinions should be rejected. By lapse of time, by new combinations and events, and by revolution, the principles of government may be altered and improved, and we have in the present age, had many lessons to teach us wisdom. At all events, we may safely say that, at the present day, the world has become enlightened in the science of government, as well as in all the other departments of human knowledge, far beyond what was known to those writers who have lived centuries ago, and, therefore, that the maxims of government of the present day may be considered, at least, as well understood, and better adapted to the rights and feelings of mankind, than they could have been, in the days of Grotius and Puffendorff.

But, let us look more immediately to the laws of our own country, as the principles there adopted, must serve to guide our decision on the question. The law of England recognizes the law of nations as part of the common law of the land, and, although, upon this question, from the insulated situation of that country, we do not meet with numerous decisions on the point, yet, we find enough to satisfy us that we are holding to those principles which have been there adopted. Here, we must refer to the cases cited at the bar, as furnishing the only light on the subject which we have at this moment been able to procure. In the case of *Rex* vs. *Hutchinson*, (2) the court refused to bail a man committed

(1) *Instit. du droit des gens*, etc., par C. Gerard de Rayneval, liv. II, ch. III, § 4, p. 134.

(2) 3 Keb. Rep., 785.

for a murder in Portugal. In *Col. Lundy's* case (1), who was arrested in Scotland, for a capital offence committed by him in Ireland, it was held, that he might be sent there to be tried. Justices of the peace, in England, may commit a person offending against the Irish law, in order to be sent to be tried in Ireland. (2) So in *East India Company* vs. *Campbell*, it was held, that one may be sent from England to Calcutta, to be tried for an offence committed there. (3) In *Mure* vs. *Kaye*, (4) judge Heath said, " that it has been generally understood, that wheresoever a *crime* has been committed, the criminal is punishable, according to the *lex loci* of the country against the law of which the crime was committed, and, by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed, in bringing the criminal to justice. In lord Loughborough's time, the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal; and, it was a question, whether we could seize them, and send them to Holland, and it was held we might. And the same has always been the law of all civilized countries, it has however been said, that the cases of *Lundy*, *Kimberley*, and *Campbell*, do not apply, as the countries to which these persons were sent, were under the same dominion of the authority sending them, and, therefore, there could be no question raised touching international law. This may be considered as ingenious, but we think not the true construction to be put upon these cases, for the question was the right to send these persons to a different country from that in which they then were, to be tried by the laws of that country, for an offence committed against them, and, without some law to warrant this, and none is cited or relied on, the Sovereign had no more authority to send those persons to such distant countries for their trial, than he had to send them to a foreign country for this purpose; besides, we see nothing said in any of these cases which can lead us to believe that the decision was founded on the power of the Crown over these several countries; on the contrary, from what was observed, in Campbell's case, we must believe it was the general principle we here contend for which was recognized. In that case, the court is stated to have said, " that the " government may send a person to answer for a crime, " wherever committed, that he may not involve his country,

(1) 2 Vent. R., 314.

(2) *Rex* vs. *Kimberley*, Str. R., 848.

(3) 1 Ves. sen., 246.

(4) 4 Taunt R., 34.

" and to prevent reprisals. " In the two other cases, the pretence that the offended country was under the same dominion, will not apply; the general principle is there clearly established, particularly, in the latter of *Mure* vs. *Kaye*, for, there, judge *Heath* lays it down, as the law of all civilized countries, and, although the particular instance for elucidating this general principle in the case of the Dutch sailors has been called a case of piracy, and, as such, always restrained among friendly nations, yet, without a particular treaty on this subject, this case presented only a question of international law, which stood upon no better *right* than the present; the particular circumstances alone could lead to a more ready exercise of the right of interference of the British government, and accordingly we find it laid down in Chitty's *Treatise on criminal law*, (1) as a *general principle*, " that " if a person having committed a felony in a foreign country " comes into England, he may be arrested here, and conveyed " and given up to the magistrates of the country against " the laws of which the offence was committed, " and he cites, as the groundwork of this principle, the above case of *Mure* v. *Kaye*.

Two cases have been cited, as having been decided in the United States of America, applicable to that before us: the one by chancellor *Kent*, in the state of New York, and the other by judge *Tilghman*, in the state of Pennsylvania. We are happy to have the opinion of enlightened men, upon a question of this kind, laid before us, particularly, from a country with which our communications are so frequent, and our interests mutual. The opinions of these learned men are however, at variance upon some points, so that the question might still be considered as unsettled in that country, without some local law on the subject. We cannot, however, help expressing our entire approbation of those principles which have been adopted, and so forcibly applied by the chancellor, in his judgment; they appear to us to be founded on a fair interpretation of the law, and well suited to the national intercourse, and good understanding, between the two countries.(2)

(1) Vol. 1, p. 16.

(1) The case referred to is, Matter of Washburn, 4 Johns, Ch. R., 106, in which it was decided, 1. That it is the law of nations to deliver up offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. 2. It is the duty of the civil magistrate to commit such fugitives from justice, to the end that a reasonable time may be afforded for the government to deliver them up, or for the foreign government to make application to the proper authorities for that purpose. 3. But, if such application is not made in a reasonable time, the party ought to be discharged. 4. The evidence, to detain a fugitive from justice, for the purpose of being surrendered to his gov-

The opinion and decision of judge *Tilghman*, which has been cited, and relied on by the prisoner, does not seem to favour his case; we would even say, that some parts of it make strongly against him. (1) According to the report of the decision which has been communicated to us, it would appear that one Short, who had fled from Ireland to the United States, was charged by an individual there with having committed a murder in Ireland, and was arrested at the instance of this individual, with a view to his being sent back to Ireland; but no demand had been made of the accused by the government, nor had the executive of the United States directed any thing to be done in regard to him, either as to his arrest or detention. The prisoner Short being brought before judge *Tilghman*, on the writ of habeas corpus, it became a question before him, how far the prisoner was liable to be detained under such circumstances. The judge determined that he could not. But this is not the case of the prisoner before us, for he has not only been accused of a crime, but, by the order of the executive government, it is directed that he shall be delivered up to the legal authority of that state where the crime was committed; and, from what we can collect of judge *Tilghman's* decision, there is some reason to believe, that, had the prisoner Short, when brought before him, stood in the same situation as the prisoner now does, he would have determined differently. We will make a short extract from this decision, to show the reasonableness of this belief, from the general principles there stated, which we conceive to be consistent with the opinion we now hold; he says: "I grant, that, when " the executive has been in the habit of delivering up fugiti- " ves, or is obliged by treaty, the magistrates may issue " warrants of arrest, of their own accord (on proper evi- " dence), in order the more effectually to accomplish the in- " tent of the government, by preventing the escape of the " criminal. On this principle, we arrest offenders who have " fled from one of the United States to another, even, before " a demand has been made by the executive of the state from " which they fled. But, what right is there to arrest, in cases " where the government has declared that it will not deliver

ernment, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. 5. The 27th article of the treaty of 1796, between the United States and Great Britain, was merely declaratory of the law of nations on the subject; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two powers. 6. Therefore, the chancellor, or a judge of the Supreme Court in vacation, has jurisdiction to examine a prisoner brought before him on *habeas corpus*, and who had been taken in custody, on a charge of theft or felony committed in Canada, or a foreign state, from which he had fled, and, if sufficient evidence appears against him, he may be remanded; otherwise, he must be discharged.

(1) *Commonwealth* vs. *Deacon*, 10 Serg. and Raw., 125.

" up ? For what purpose is such an arrest ? Can any judg-
" ment be given, by which the executive can be compelled to
" surrender a fugitive ? most certainly not. If the president
" of the United States should cause a person to be impriso-
" ned, for the purpose of delivering him to a foreign power,
" the judges might issue a habeas corpus, and enquire into
" the legality of the proceeding, but they have no authority
" whatever to make such delivery themselves, or to command
" the executive to make it. If these principles be just, it fol-
" lows, that, under existing circumstances, no magistrate in
" Pennsylvania has a right to cause a person to be arrested,
" in order to afford an opportunity to the President of the
" United States to deliver him to a foreign government. But
" what, if the executive should hereafter be of opinion, in the
" case of some enormous offender, that it had a right and was
" bound in duty to surrender him, and should make applica-
" tion to a magistrate for a warrant of arrest ? That would
" be a case quite different from the one before me, and I
" should think it imprudent, at the present moment, to give
" an opinion on it. *Every nation has an undoubted right to*
" *surrender fugitives from other States. No man has a right*
" *to say: " I will force myself into your territory, and you*
" *shall protect me."* In the case supposed, the question would
" be, whether, under the existing constitution and laws, the
" president *has a right to act for the nation*, or, whether he
" must wait until Congress think proper to legislate on the
" subject. The opinion of the executive hitherto has been, that
" it has no power to act, and should it ever depart from that
" opinion, it will be for the judges to decide on the case as it
" shall then stand. Neither do I give any opinion whether the
" executive of the state of Pennsylvania has power to cause a
" fugitive criminal to be arrested for the purpose of delive-
" ring him up. But, confining myself to the case before me,
" in which the arrest was made at the request of a private
" person, I am of opinion that there is no law to support it,
" and, therefore, the prisoner is entitled to his discharge."
Taking, then, the opinion of judge *Tilghman*, on the princi-
ple here stated, and supposing that there existed a law in the
United States, authorizing the president to act for the nation,
as the prerogative of the King of Great Britain authorizes
him to act in this behalf, there can be no doubt, but, that, in
the one country as well as in the other, what the executive
legally directed to be done, in regard of delivering up a fugi-
tive, would be confirmed by the judiciary.

The objection, that the offence charged against the prisoner,
is not of that enormity as either to require, or permit that
the executive should interfere to deliver him up, can have no

weight. It would be difficult to establish a rule, where none has been settled, to enable us to distinguish the shades of enormity of different offences, their evil tendency, or pernicious effects, so as to limit the power of the prerogative as applicable only to such crimes as are productive of a certain *quantum* of evil in a state. The certain and positive rule laid down by all writers on international law, and the decisions had thereon, as above referred to, agree in saying, that where a *crime* has been committed, the criminal may be surrendered to the offended country. There is certainly great difference of opinion among these writers as to what kind of crime this ought to apply: some holding it to extend only to *high treason, robberry, and murder*, while others apply it to minor offences, and even to civil damage; but, where the general right is acknowledged, it must be left to neighbouring nations to determine the necessity of enforcing it, according as good policy and sound discretion shall require.

3. It is, however, further objected, that allowing the sovereign may have the power to deliver up a criminal to another state, yet that such power cannot be exercised by the governor of this province, who, as the servant of the Crown, cannot be considered as vested with the exercise of such high prerogative, or, at furthest, it is necessary to show, that, by his commission, he is vested with this authority. It would certainly be considered rather extraordinary that this, or any other prerogative of the Crown, necessary to be extended to every part of its dominions, and none more than this province, should require either the personal presence of the sovereign, or his express mandate in every case of the exercise of his right. This would render it nearly impracticable, and certainly most burthensome to the subject, when seeking to derive a benefit therefrom. But the prerogatives of the Crown do not rest on this limited principle; they are equally in vigour in all its possessions, and may at all times be exercised, when necessary for the general welfare. The principle, as laid down by eminent Crown lawyers, and explained by Chitty, (1) is, that the King's prerogative in the colonies, unless where it is abridged by grants, etc., made to the inhabitants, is that power over the subject, considered either separately or collectively, which, by the common law of England, abstracted from acts of parliament, and grants of liberties, etc., from the Crown to the subject, the King could rightfully exercise in England; that is, that the common law of England, with respect to the royal prerogative, is the common law of the colonies. As, therefore, the prerogative

(1) On prerogative, 32-3-4; 1 Chalm, *Op.*, 232-3.

rights in Canada are the same, by law, as in England, how are they to be exercised but by His Majesty's representative in the colony? governors of colonies, although but the servants and representatives of the King, yet, are, in general, vested with royal authority, and exercise many kingly functions. It is true, they cannot declare war, nor make treaties, nor do many other acts of royal authority, which involve the interests of the whole realm; but what regards the security, the interest, or the honor of the province over which he presides, every governor of a colony, as the King's representative, must hold and be authorized to exercise all royal prerogative incident to that situation, as a thing requisite for the maintenance of the public welfare, unless it has been particularly excepted and reserved by his commission. The governor is answerable to the King for this exercise of the prerogative, and, for the right discharge of his duty, and, if, in the case before us, the party be aggrieved, the question must be settled according to the principles of international law, between the sovereign of that country to which the prisoner belongs, and the King's majesty, but not by his courts of justice.

4. It has also been objected that no demand appears to have been made by the American government, or by any of the American states, for the surrender of the prisoner. But it is not for the court to enquire into this. The nature of the demand, and the sufficiency of it, must be best known to the executive, to which it is made, and which alone is competent to determine how far the royal prerogative ought to be exercised. What we have to determine is, whether there was legal ground for the arrest and surrender of the prisoner, and we hold there was. By the warrant of His Excellency the governor in chief to the sheriff, the latter is authorized to convey and deliver up the prisoner to such person or persons, as, according to the laws of the said state of Vermont, may be lawfully authorised to receive him, that is, the executive authority of that state, and we must presume it was the same authority which demanded him. This is not, however, a question for our consideration.

But, the prisoner comes before us in a very different character from that of a subject to whom protection is due as of right; he is an alien, to whom protection is not due, if the King sees fit to withhold it. The observation of judge *Tilghman* may well be applied to him: "*That he cannot force* " *himself into the King's territories, and say you shall protect* " *me.*" It is held (1) that alien friends may lawfully come

(1) 1 Chitty, *on prerog.*, p. 49; 1 Black Com., 259, 260.

into the country, without any licence or protection from the Crown; though it seems that the Crown, even at common law, and by the law of nations, possesses a right to order them out of the country, or prevent them from coming into it, whenever His Majesty thinks fit: and the reason given is (1) that it is inseparable from the governing power in any country, that it shall be able to take precautions against foreigners residing in such country, and particularly in a country where foreigners are only amenable to the ordinary laws. The prisoner came into this province under suspicious circumstances, charged with a felony; as an alien, his conduct dit not merit protection, unless he had come with a fairer character, and he ought not to be surprised, nor to complain that His Majesty's government sould direct him to be taken back to that country whence he came. (2)

Upon the several grounds alleged, therefore, the court have no hesitation in saying, that the prisoner cannot be liberated from the restraint under which he is held, but that he must be remanded to the custody of the proper officer, for the execution of the warrant issued against him, in the name of His Majesty. (*Stuart's Rep.*, p. 245.)

PRIVILEGE.—MASON.

COURT OF APPEALS, Quebec, 30th July, 1827.

On appeal from Quebec.

CHARLES JOURDAIN, Appellant, and JOSEPH MIVILLE, Respondent.

The mason has an especial privilege, in the nature of a mortgage, upon any building erected by him and for repairs.

This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless, within a year and day there be something specific to shew the nature of the work done or the amount of the debt due thereon. (3)

(1) 1 Chitty, *Crim. law*, 131, and 143, note (*a.*)

(2) In the 11th section of the habeas corpus act (Prov. Stat., 24 Geo. III, ch. 1, § 11), it is enacted, "That no subject of His Majesty, his heirs or successors, that now is or hereafter shall be an inhabitant or resident of this province of Quebec, shall, or may be sent prisoner into any province or into any state or place, without this province, or into any parts, garrisons, islands, or places beyond the seas, which are, or at any time hereafter shall be within or without the dominions of His Majesty, his heirs or successors; and that every such imprisonment, or transportation, is hereby enacted and declared to be illegal." By the same section, any person acting contrary to this provision is subjected to a penalty of £500.

(3) V. art. 2013 C. C.

A dwelling house and two adjoining buildings, belonging to Félix Tetu, were taken in execution, and sold by the sheriff, at the suit of the Respondent, for the sum of £3000. The Appellant, by an opposition to the distribution of this sum, demanded, 1. The sum of £500, the amount of an obligation from Tetu, bearing date the 5th day of October, 1810, to secure the same, as a balance due to the Appellant, for work and labor performed in the building of the said dwelling house; 2. The sum of £300, the amount of another obligation, bearing date the 28th day of May, 1820, executed between the same parties; 3. The sum of £797. 15. 6., for work and labor performed, in and about the same dwelling house and adjoining buildings, alleging, in his opposition, that, by the laws, usages, and customs of this province, a right had accrued to him to have the same, by especial privilege, out of the proceeds of the sale of the said dwelling house and adjoining buildings.

The right of the Appellant to receive the sum first demanded was not questioned. The second was not awarded to him; and, by the judgment of the court below, the said sum of £797. 15. 6. was allowed to him, but without any preference over Tetu's other creditors, and, from this judgment, the present appeal was instituted.

REID, CH. J.: In the case of the mason, for building, or for repairs done by him, the law allows a privilege, which, to a certain extent, has the effect of a mortgage upon the building or repairs so done, and gives him a preference thereon, for his payment. This cannot be denied; the authorities of law are too numerous and decided to admit of doubt. But, it is contended, that this privilege cannot be exercised, to the prejudice of a third person, without something specific to ascertain the nature and extent of the work done, or the amount of the debt due thereon, and all this, within the year and day; so as not to deceive third persons, or lead them to trust their property in the hands of men, against whom, either by connivance or otherwise, such privileged claims may be brought forward. We are disposed to think this objection valid, and that the judgment here appealed from must be confirmed.

In looking at the jurisprudence, on this subject, it would appear, that previous to the *arrêt de règlement* of the 18th August, 1766, the decisions of the courts were not uniform, as to what would or would not entitle the mason to claim his privilege, even, within the year and day, that is, whether a *devis et marché* previously made, and a *procès-verbal* of the reception and value of the work subsequently done, were, or were not necessary. By some of the decisions, it would seem that these formalities were required, by others they were

dispensed with. But the inconveniences arising from these contradictory decisions, respecting a privilege which often extended, in its amount, to the value of a great part of the property in question, were strongly felt: and, by the above *arrêt de règlement*, a certain mode of proceeding was established, in order to secure the rights of all parties. We must, however, be satisfied how the question would have stood, previous to the making of this *arrêt de règlement*, as to the diligence to be exercised by the mason, in prosecuting his claim: we find, according to the best established jurisprudence, that the workman, claiming a privilege on the work done by him, but not founded on any authentic document of a nature to ascertain *when* the work was done, the *nature*, the *value*, and the extent thereof, was obliged to prosecute his claim within the year and day, so as to make the privilege available, when it came in contact with the rights of third persons. The end and object of the 127th art. of the Custom of Paris, was to limit the extension of credit, and to prevent lawsuits among persons of the description therein mentioned, often injurious to themselves, and to those dealing with them. The words of the article are very strong, *ne peuvent faire action après un an passé*, which would seem to imply, a limitation of action; (1) and, although by an equitable interpretation which has been put on this article, the mason, or other artisan therein mentioned may have his action against his debtor even after the year and day, yet, in this case a certain discredit attaches to it, and, if the debtor will avail himself of the *fin de non recevoir*, such legal presumption is raised against the action, that the whole is made to rest on the oath of the debtor. This is the case as between the workman and his debtor, but, when his claim, with its attendant privilege, comes in contact with the rights of a third person, the legal presumption, against an unliquidated demand beyond the year, becomes much stronger, and this privilege must yield to the authenticated claim of a more diligent creditor. This seems to be the principle of law to be observed, as far as we can collect it, from the opinions and decisions had on the question. *Denizart* (2) gives an instance where the privilege was adjudged to the mason who had not taken the precaution to obtain a *devis et marché*, this was previous to the *arrêt de règlement* of 1766; but the author observes, upon this judgment, " *qu'il doit être* moins regardé comme un témoin de la " jurisprudence du tribunal (Chatelet) que comme les derniers " soupirs d'une opinion mourante. " And, in a note upon the

(1) V. art. 2260, § 6, C. C.

(2) Denizart, *verbo* privilège, n° 38.

case, we are told upon what principle this privilege was granted. He says: "J'ai sçu depuis de M. Lois, que la question " avait été deux fois partagée dans cette affaire, et qu'on " s'était enfin déterminé à accorder le privilège, parce que, " dans le fait, il s'agissait d'une construction totale et à neuf " d'une maison sur une pièce de terre; *et que, d'ailleurs, les " ouvriers s'étaient pourvus presque aussitôt les ouvrages " finis, sans attendre l'expiration de l'année, pendant laquelle " la coutume leur accorde action.* " In the authority cited by the Appellant, from *Lacombe*, (1) after stating the principle, that a *devis et marché* was not necessary to secure the privilege of the workman, and citing several decisions to that effect, he, at last, comes down to an *arrêt* de la " Cour des " Aydes, 8 juillet 1728, au rapport de M. Amiot, sur l'ordre " du prix d'une maison sise à Fontenay, près Paris, vendue " sur le sieur Taxis, receveur des tailles, par lequel les ou- " vriers qui avaient travaillé à la reconstruction et fourni " des matériaux, ont été colloqués par privilège, même au Roi, " quoique, pareillement, ils n'eussent point de *devis et marchés*, " ni même de mémoires arrêtés, mais seulement des sentences " par défaut, depuis l'évasion de Taxis, *mais, dans l'an des " derniers ouvrages.* " This may be considered a strong case in favor of the privilege contended for by the Appellant, but he falls short in that material point on which the judgment here was founded, the diligence done by the workman *dans l'an des derniers ouvrages.* We have also the opinion of other writers on this subject. *Bourjon*, says: "Ce privilège a lieu en " faveur des ouvriers, selon moi, encore qu'il n'y ait aucun " devis ni marché par écrit, pourvu que les ouvrages soient " constans, ou que, s'ils sont déniés, ils puissent être vérifiés, " *et que l'ouvrier ait agi dans un temps compétent, c'est-à-dire, " dans le temps que la coutume a fixé pour la durée de son " action.* " (2) *Pothier* is somewhat more explicit, in the reasons he gives, " observez à l'égard de ces créanciers qui ont " conservé ou mélioré l'héritage, que, pour qu'ils puissent " exercer leur privilège, il faut, ou qu'ils ayent donné leur " demande dans l'année de la perfection de leurs ouvrages, " parce qu'autrement il y aurait une fin de non-recevoir " acquise contre leur créance: ou qu'ils soient fondés dans un " marché fait par acte devant notaire, ou du moins dans une " obligation par-devant notaire, passée dans la dite année. " *Un titre de créance sous signature privée, est bien valable " vis-à-vis du débiteur, et, pareillement, une obligation passée depuis l'année; mais ces actes ne doivent point donner*

(1) Lacombe, *verbo* subrogation, n° 16.

(2) 2 Bourj., *Des exécutions*, tit. VIII, sec. 10, § 105, p. 597.

" *de préférence au créancier contre des tiers, parce qu'autre-*
" *ment des débiteurs pourraient, en fraude de leurs légitimes*
" *créanciers, ressusciter des créances déjà acquittées.*" (1)
Here, we see the distinction evidently marked between the remedy which is still preserved to the workman against his debtor for the value of his labor, even, after the lapse of the year and day, and the privilege claimed thereon. The remedy of the debtor affects him only, he owes, and justice requires that he should pay what he owes, nor can he avail himself of the tardiness of his creditor to proceed against him, while the debt remains unpaid; but, in regard of the privilege, it is not extended on the same equitable principle with the action, because it tends to the prejudice of third persons, and to render ineffectual the security of *bonâ fide* creditors, on the property of such debtor. Laches must always operate against him who looks for an advantage, and will, in other cases besides the present, destroy the claim of privilege, *quoad* third persons, who are often ignorant of the many dealings and transactions between their debtor and particular creditors. and cannot always be prepared to meet the contrivances that may be formed to frustrate their claims. The law, therefore, seems to protect the diligent creditor in a case of this kind, against a privilege which may be set up by collusion with the debtor, or upon the mere assertion of the workman, who shows no contract, nor any sufficient diligence to secure such privilege.

It is somewhat remarkable in this case, that, when the Appellant was taking the means to secure a debt due to him from the Defendant Tetu, by obtaining the notarial obligation of the 28th May, 1820, he should allow an open account of many years standing, and upon which he here founds his privilege, to remain unliquidated. It is a strong presumption that the Appellant never looked to any other than the personal security of his debtor, Tetu, for this account. The Appellant seemed satisfied that his claim should remain on that footing, and, there, we think it ought still to rest.

Judgment affirmed. (*Stuart's Rep.*, p. 263.)

(1) Poth., *Traité de l'hypothèque*, p. 453.

CONTEMPT OF COURT.—DAMAGES.—ACTION AGAINST A JUDGE.—JURISDICTION.

COURT OF KING'S BENCH, Three-Rivers, 16th and 29th January, 1828.

DICKERSON, against FLETCHER.

In an action of trespass, for assault and imprisonment, against the provincial judge of the inferior district of St. Francis, for issuing process of attachement for contempt, against the editor and printer of a public newspaper, for publishing certain papers; *held*, that, as the acts complained of were performed by the judge in his judicial capacity, the court could not take cognizance of them, and, therefore, had no jurisdiction.

This was an action of trespass, for assault and imprisonment. In his declaration, the Plaintiff styled himself "printer and editor of the *British Colonist* and *St. Francis Gazette*," and designated the Defendant as "provincial judge of the inferior district of St. Francis." The Defendant pleaded a declinatory exception, or an exception to the jurisdiction of the court, alleging that it could not take cognizance of the action, because he, the said Defendant, at the several times in the declaration mentioned, and, long previous thereto, was, and, from thence to the time of the commencement of this action, had been judge of His Majesty's provincial court, for the inferior district of St. Francis, in this province, and had, of right, holden, and did still hold the said provincial court, by virtue of the statute in that behalf provided. That the judges of the said provincial court, and other, His Majesty's provincial courts in this province, or any of them, were not responsible, nor could the judicial couduct of them, as aforesaid, be called in question, in the Court of King's Bench for this district, or any other of His Majesty's ordinary courts of judicature, in this province, or otherwise, in any manner whatever, unless it were by way of impeachment, before our lord the King, and the imperial parliament of Great Britain and Ireland, or the provincial parliament of this province of Lower Canada, or, by way of complaint, before the King, in his privy council, and that the several supposed trespasses in the declaration alleged to have been committed by him, consisted in his having, as such judge, as aforesaid, and in the exercise of his public functions in that behalf, made certain rules and orders of His Majesty's said provincial court, by virtue whereof certain writs of attachment of contempt were and had been issued out of the said provincial court against the Plaintiff, by reason of certain contempts thereof, which it was alleged the Plaintiff had committed against the said

court; and, in certain arrests and imprisonments to which the Plaintiff had been subjected, and which he had undergone accordingly, under such writs of attachment of contempt, and under certain judgments of the said provincial court in that behalf, and respecting certain matters of which the cognizance appertained to and were within the legitimate jurisdiction of the said provincial court, and that this action was brought for no other matter, cause or thing whatsoever. The Plaintiff fyled a general answer to this plea; the parties were previously heard upon the pleadings, when the adduction of evidence was ordered by the court. Evidence was accordingly adduced: that of the Plaintiff consisted of the original affidavits, the interrogatories and examinations shewing the origin of the charges of contempt, and the course of procedure, with regard to them: the evidence of the Defendant consisted of the examination of the Plaintiff on *faits et articles*, and the entries in the register of the provincial court relative to the several cases in which attachments had been issued, or ordered against the Plaintiff.

It appeared that there were four cases in which attachments of contempt had been issued, or directed to issue. The attachment in the first case was founded on two papers, in the *British Colonist* of the 2nd March, 1826, one of them was in the form of a letter to the editor, signed *Philo Junius*, and the other, a report of a case which had occurred in the provincial court, with animadversions thereon, signed *Scrutator*. In this case, the Plaintiff had made an affidavit that the papers were published by him, but that he was not the author of them, at the same time, stating who was the author, to which affidavits the original manuscripts were annexed. In the June term, the court made an order, that the recognizance of the Defendant, and his bail should be discharged, on his entering into a new recognizance, without sureties, to appear whenever he might thereafter be required. In the September term following, the Plaintiff moved, by his counsel, for judgment, and thereupon, the court rendered a judgment of conviction imposing a fine of £5.

The second case was founded on two papers, one of them signed *Vindex*, and the other *F. A. Evans*, in the *British Colonist* of the 23rd November, 1826. The Plaintiff, upon conviction, was condemned to pay a fine of £10 sterling, and to find sureties for his good behaviour for three years.

In the third case, an attachment had issued against the Plaintiff and another, for sending a written paper to the Defendant, charging him with having issued a writ af attachment against the Plaintiff, "without any reasonable or probable cause whatever," and, at the same time, giving him

notice of his intention to institute an action against him. In this case, the court made an order similar to that in the case first above mentioned.

In the fourth case, a rule for an attachment had been made in consequence of a paper published in the *British Colonist* of the 9th November, 1826, but it did not appear that, at the commencement of this action, an attachment had issued.

Mr. justice FLETCHER: The Defendant contended, that a judge is not, in any case, responsible for his judicial conduct, before any of His Majesty's ordinary courts of judicature. (1) It is remarkable, that, from the earlist periods, in the history of England, to the present day, there never had been an instance of an action against any man in the rank and character of a judge. The instance which came nearest to it was an action against the recorder of London, acting as a commissioner of *oyer* and *terminer*, at the Old Bailey, for fining a juryman. (2) This action had been, not only dismissed, but most strongly reprobated by the Court of Common Pleas, as a bold attempt against the law and jurisprudence of the country. The authority of this case has been admitted upon every subsequent occasion that it had been mentioned; in one instance, as recently as the 28th of May last, when it was cited, with approbation, by lord *Tenterden*, in the case of *Garnett* vs. *Ferrand*. If an action of this kind were instituted against a judge in England, the proceeding would be set aside, even on motion, the Plaintiff and his attorney would be attached and punished, both by the court in which the Defendant presided, and that in which the action was brought: by the former, for an attack on its independence, and, by the latter, for an abuse of its process. Mr. justice BAYLEY, in the case of *Burdett* vs. *Abbott*, (3) speaking of the responsibility of judges, and of the power of revising their decisions, in cases of contempt, by other courts of judicature, in actions brought against them or their officers, said, that, if they were responsible before any other tribunal whatsoever, they must be so, *even before the lowest*. According to this doctrine, "if this court" (the King's Bench of England) "were to adjudge a party to be guilty of contempt, and to direct an attachment to issue against him, and to commit him for that contempt, any other court, however inferior, might try the same question again, in an action of trespass; and enquire whether or not the party was guilty of the facts of which this court had adjudged him to be guilty, and whether that

(1) Hawkins P. C. B. j., ch. LXXII, s. 6, and B. ij., ch. XV, s. 24.

(2) *Hamond* vs. *Howel*, 2 Mod., 218.

(3) 14 East, 160.

fact was a contempt of this court," and, in another part of the same case, the same judge also remarked, "that, if an action could be maintained, in any court, it could be maintained even in the county court, though it could not hold plea to the amount of forty shillings; for the Plaintiff would only have to lay his damages at thirty-nine shillings and eleven pence, and the court then would be as competent to try the question and award damages to that amount, as the highest tribunal in the country." It is clear, therefore, that, if this action could be maintained, every judge in the country would, not only be responsible before his own court, and every other Superior Court in the province, but also before the provincial courts, or even before commissioners of small causes, if trespass *vi et armis* were added to the list of subjects of which they could take cognizance, to the amount of their respective jurisdiction, for every compulsory process which might be awarded; and that nothing but confusion and the total annihilation of the judiciary could possibly ensue.

The majority of pleas alleging the judicial character of a Defendant which are to be found in the books are in bar, not to the jurisdiction of the court, and rightly so, there never having been an instance of an action against a judge in the British dominions, and no other man having a right to object to the jurisdiction. As, for example, if an action were brought against a justice of the peace, in the provincial court of St. Francis, his conduct might have been unimpeachable or even laudable, or he might have exercised his judicial authority, in a case where the court had no right to revise his decision, yet must allege this, by a plea in bar. He could not object to the jurisdiction, for the jurisdiction exists and is indisputable, there being no other tribunal before which he could be tried. If the Defendant were a judge, the case would be different, he would have a right to say, "the act complained of was performed by me in the exercise of my judicial functions. We are, it is true, answerable before each other, as individuals, but not as judges, *inter pares non est potestas*. My judicial character, and my conduct in the office which I bear, are sacred, and can only be called in question by that power from which the authority of us all emanates. Here, therefore, your jurisdiction fails, and I beg leave to suggest this for your own decision, subject, of course, to a right of appeal on my own part, if I shall conceive the judgment in this case to have been erroneous.

It will be argued, by the Plaintiff's counsel, that the whole business of contempts, and, particularly, such as were supposed to have been committed out of court, was altogether *coram non judice*, and that the present action, therefore, must lie.

The universality of this proposition must be denied, and the case now before the court, affords a proof that if the proposition were in any case true, it is not generally so. The plea itself suggests that this case is now *coram non judice*, and that this court had no right to take cognizance of it. If such a doctrine were admitted, it would, of course, follow that, if the court would reject the plea, and proceed to judgment and execution, and that that judgment should afterwards be reversed by the Court of Appeals, an action would lie at the suit of the present Defendant against the judges now on the bench, for having so done. Now, it is contended, that no such action would lie, and, applying this case to the one before the court, if it should be conceived that the judge of St. Francis has erroneously imagined that a matter was within his jurisdiction, which this court, may think was not so, it, by no means, follows, that he would be liable to an action for such and error, in his judicial decision.

The next question which would be agitated on the other side was, whether the ten judicial public functionaries, directed by the Provincial Statute, 34th Geo. III, ch. VI, to preside, in the several Courts of King's Bench and provincial courts thereby established, are really judges, and entitled to the privileges and immunities which belong to the other, at all times and upon all occasions, when acting in the execution of any of the multifarious duties with which they are charged by that act; or, whether only eight of them are so, and that, only when acting in the execution of a comparatively small part of those duties, that is to say, when sittting in the superior terms of the Courts of King's Bench. It is contended that they are, all of them, judges, and, upon every decision where they are executing any part of their judicial functions, for the following reasons: 1. The judges of England are considered as being so, whether in banco, at *nisi prius*, or on any other occasion where they are called upon the execute any part of their public duties, though they sit under a great variety of commissions, some of a general, and others of a circumscribed nature, some of them temporary, an l others permanent, and many of them of a very subordinate description to the original patent by which they were first constituted judges. 2. Because the judges of the Courts of King's Bench in Lower Canada, when sitting in the inferior terms, or on the *tournées*, cannot be entitled to any privileges or immunities which do not equally belong to the judges of the provincial Courts. If the pecuniary extent of the jurisdiction of the court be considered as the criterion between the responsibility and irresponsibility of the judge; this criterion would as well apply, to render a judge of the Court of King's Bench, when sitting

on either of the two last mentioned occasions, responsible in an action in his own court, or in any other in the province, as it would to render a provincial judge so liable. Every clause of the statute, 34th Geo. III, ch. VI, in which the several courts are spoken of, either expressly gives them the same general powers and immunities which belong to all courts of record, or clearly evince the understanding of the legislature, that they should possess them equally, from the time of their establishment, by the common law of the land. The 11th section of this statute expressly gives the same powers, in vacation, to the judge of the provincial Court at Three Rivers, as are given to the judges of the Courts of King's Bench for Quebec and Montreal, and classes them together, in the same sentence. The 22d section, in declaring that the refusal to surrender and deliver certain records by the officers of the Courts of Common Pleas, to the clerks of the Courts of King's Bench and provincial courts, established by that act, shall be deemed and considered to be a contempt of the last mentioned courts, which would otherwise, perhaps, have been an extremely doubtful point, takes it for granted, that the Courts of King's Bench, in their superior term, and the provincial court, possess equally the power of punishing contempts, whether committed in or out of court, and, accordingly, classes them in the same sentence. The 33rd section, in declaring that other acts of the same nature, by the officers of the courts of request, shall also be considered as contempts, classes the provincial Courts, in like manner, with the inferior terms of the Courts of King's Bench, making no difference whatever between them, with regard to their general power of punishing for contempts. Taking these two clauses together, the legislature must have understood that the provincial Courts ranked with the superior terms of the Court of King's Bench, in cases where they were to take cognizance of actions for more than the amount of £10, and with the inferior terms of the same courts, in cases where the cause of action did not amount to that sum; thus holding a kind of intermediate rank between them, and that all the three descriptions of courts were coequal with regard to their general power of punishing contempts, whether committed in or out court. With regard to the provincial court of St. Francis, it would be found that, by the 2d section of the statute, 3 Geo. IV, ch. XVII, by which that district was established, it is enacted "that there should be appointed a judge *for the said inferior district*, who should hold a provincial court for the said inferior district, evidently, indicating the sense of the legislature that the public functionary so to be appointed, was to be a judge, and that the powers and authorities of the provincial Court, which he was to

hold, as a part of his public duty, had been sufficiently designated and described by the antecedent statutes, by which the provincial courts already in existence had been established. There were other clauses, also, in the St. Francis act, 3 Geo. IV, ch. XVII, which, when compared with the correspondent ones, in the antecedent act, 34 Geo. III, ch. VI, manifestly evinced the same general intention on the part of the legislature, that the courts, established by each, were to be deemed and taken to be of the same description. The first part of the 7th action of the St. Francis act, which relates to evocations from the provincial court of St. Francis, is in exactly the same term, as the latter part of the 10th section of the judicature act, 34 Geo. III, ch. VI, which relates to evocations from the inferior terms of the Court of King's Bench, for Quebec and Montreal, and the 21st section of the same act, which relates to evocations from the courts of *tournée*, manifestly shewing that the legislature thought there was no difference between them. The latter part of the last mentioned section in the St. Francis act which relates to the recusation of the judge of the provincial court of St. Francis in certain cases, is also in the same terms, word for word, as the 13th section of the old judicature act, 34 Geo. III, ch. VI, which relates to the recusation of the judge of the provincial court for Three Rivers in similar cases, also indicating that the legislature clearly understood that there was no distinction whatever to be made between the two provincial judges of Three Rivers and St. Francis in this respect. With regard to the general rank of the judges of the provincial Courts, as well as of those of the Court of King's Bench, as judges, it is to be observed, that they all sign the same state roll, and take and subscribe the same ancient and solemn oath, which is appointed to be taken by the judges of the land; that the provincial judges were and always had been distinguished by the same titles and signatures as belong to the puisné judges of the Courts of King's Bench, and that they always have been, since their first institution, placed in succession at the head of all the commissions of the peace, for every district in the province, the whole of which marks of distinction belong only to the judges of the land, in any of His Majesty's colonial dominions.

The only remaining question which it appeared probable, could be drawn into discussion, by the counsel for the Plaintiff, was that which related to the general power of punishing for contempts, by courts of record. This must be decided by reference to the criminal law of England, which had become a part of the code of this country, by the operation of the British statute of 1774, of which this subject formed a very

large head. If it were to be contended that a difference exists, with regard to contempts committed in or out of court, such a distinction did not appear from the authorities to be clearly marked; on the contrary, all the best writers asserted that it did not exist, or at any rate, not with regard to those courts in which the judges of the land preside. As respects contempts committed by contemptuous words or writings respecting the court, Hawkin's *Pleas of the Crown* (1) may be referred to, and every other writer on the Crown law who has treated of the subject of contempts against courts of judicature. The most copious and elaborate essay, however, on contempts of this description, and the *rationale* of the law respecting them, is to be found in a judgment prepared by lord chief justice Wilmot. (2) The whole of the doctrine there stated has been uniformly recognized in every case which has occurred since, respecting matters of this nature, and particularly by lord *Ellenborough*, in the case of *Burdett* vs. *Abbott*. (3) The exclusive right of every court to judge of contempts committed against it, is also most clearly established by every authority which is to be found upon the subject from the earliest periods. Several cases of contempts committed out of court, as well as in, are cited in the case of *The King* vs. *Crosby*, and, particularly, one of a commitment by the court of chancery of Durham, a local and provincial court of limited jurisdiction in England, in which the Defendant, having been brought up before the Court of Common Pleas, by *habeas corpus*, was not discharged, but re-committed. Lord chief justice *De Grey*, alluding to the general power which courts possess, of punishing for contempt, remarked, with reference to this case, in the case of *Crosby*, "that no court can judge of any contempt committed against another court, because the circumstances may be very different, in respect of the constitution and practice of the courts themselves. Perhaps a contempt in the House of Commons, in the chancery, in this court, and in the court of Durham may be very different; therefore, we cannot judge of it, but every court must be judge of its own contempts." In the case of *The King* vs. *Flower*, (4) the opinions of the judges were delivered in very emphatical terms: that of lord *Kenyon*, with regard to the right of punishing for contempts committed out of court, as well as in the face of it; and that of Mr. justice *Grose*,

(1) Book II, ch. XXII, § 36.

(2) Wilmot's *Decisions*, 243-271.

(3) 14 East, 131.

(4) 8 T. R, 323, 325.

respecting the exclusive right which every court possesses of judging of contempts committed against itself.

The necessity that this power or punishing contempts in the judges of the courts of record should exist, is recognized even in the United States of America, a country in which the hostility to every species of domination by man over man, was carried to its highest degree. Chancellor *Kent*, after stating the details of a long and hard fought controversy between the courts in that country on this subject, by writs of *habeas corpus* and actions against judges (which had taken place several times there, though there was no instance of the kind in England), proceeds as follows: " The result of that controversy leaves the following principles undisturbed, and tends to settle and confirm them. 1. That every court has a right to commit for contempt, and that no other court has a right, upon *habeas corpus*, to control that commitment; 2. that no judge is responsible, in a private suit, to pains and penalties for his judicial acts. If any doubt had remained, as to the ultimate effect of the decisions in the case of *Yates*, that doubt was entirely removed by the act of 1818, already referred to, which declared, that a party in prison for a contempt could not be discharged on a *habeas corpus*, so long as the power of the court which determines the contempt continued. The act may be considered as *only declaratory* of the established principle of law, that every court of justice has a right to commit for contempts, and that it belongs exclusively to the court offended, to judge of contempts, and what amounts to them; and no other court or judge can, or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction. This may be considered as the established doctrine equally in England as in this country. " (1) There have been several cases in the United States, where these principles have been adopted, as upon the trial of *Whipple* and *Strang*, for the murder of the husband of the former, before a court of *oyer* and *terminer* and gaol delivery, where an attachment was awarded against a reporter for the public papers.

That it was not necessary to press further that part of the argument which related to the inconvenience which would arise, and the inevitable destruction of the judiciary body which must ensue, if this action were maintained, being well aware that the court would state what the law really was upon the subject, and in conformity to the oaths which its judges had taken, without reference to consequences. That

(1) 2 Kent's *Commentaries on the laws of the United States*, p. 26 et seq.

the Defendant had acted according to the best of his judgment, and the dictates of his conscience, with regard to the case before the court, and he was persuaded that it would do the same as respects the question now submitted to them.

VEZINA, contra, contended for the Plaintiff, that the immunity claimed by judges belonged to them, only so long as they acted within their appropriated jurisdictions, and that, so soon as they exceeded the limits of their respective authorities, they became as responsible in action at the suit of any individual who might be injured, as any other person who had no authority whatever. The cognizance of contempts, and, particularly, of contempts out of court, did not belong to the provincial judges, and that point has already been decided in this court, in 1816, where damages has been actually awarded, against a provincial judge, for having directed an attachment for a contempt, supposed to have been committed by the publication of a disrespectful paper respecting his judicial conduct, as provincial judge, in one of the public journals. The law was the same in France, with regard to judges in that country; and that, as questions of civil right were to be decided by the French law, this being a question of that description, the Plaintiff is entitled to a judgment in his favor, and the plea of Defendant must accordingly be overruled.

The court, having taken time to consider of its judgment, it was delivered by PYKE, justice, on the 29th day of January, and entered upon record, in the following terms: "The court, having heard the parties, by their counsel upon the declinatory exception fyled by the Defendant in this cause, and, it appearing, by the evidence adduced upon the issue raised upon such exception, that the present action of damages has been brought against the Defendant, for certain acts by him done in his judicial capacity; namely, in taking cognizance, as judge of the provincial court of the inferior district of St. Francis, of certain contempts alleged to have been committed by the said Plaintiff, against the said provincial Court, of which said judicial acts this court cannot take cognizance or award damages, therefore, and, consequently, hath not, by law, jurisdiction in the present case. It is, therefore, considered that the said declinatory exception be, and the same is, hereby maintained, and that the action of the Plaintiff be, and the same is hereby dismissed, with costs." (*Stuart's Rep.*, p. 276.)

See *infra*, p. 266, the note upon the case of *Taaffe* against *the Chief Justice* of the Court of King's Bench, in Ireland.

JUDGES.—ACTION AGAINST THEM.

COURT OF KING'S BENCH, Quebec, 20th February, 1828.

GUGY, against KERR.

Held: That, an action will not lie against a judge, for any act done by him within the extent of his jurisdiction. (1)

The Plaintiff, a proctor of the Court of Vice-Admiralty, was suspended by the Defendant, the judge of that jurisdiction, from the exercise of his functions as such proctor, and this was an action for damages alleged to have been sustained by reason of the Plaintiff's suspension. The first count of the declaration stated, that, at the time of committing the grievance complained of, the Defendant was judge of the Court of Vice-Admiralty; that the Plaintiff was and had been an attorney, advocate, solicitor, proctor and counsel therein, and had been employed to defend certain suits against the brig *Sneaton Castle* and the ship *Bolivar*, which were respectively dismissed, and upon the dismissal thereof certain pretended fees had been claimed by the Defendant, as such judge, and the registrar, marshal, and crier of the said court, from the Plaintiff; that, on the 18th day of July, 1827, certain proceedings were instituted in the said court, in the name of the late registrar and other officers who by petition to the said Defendant, as such judge, did falsely, wrongfully, and injuriously represent that many of the fees and emoluments due to them, from their respective offices, still remained unpaid, particularly, in the cases of the *Sneaton Castle* and the *Bolivar*, in which the Plaintiff had appeared, as proctor for the impugnant, and prayed that the proctors of the said court might be admonished to make payment of such fees; whereas no such fees were due, nor had the said Defendant, as such judge, any power, by law, to compel him to make payment of such pretended fees, nor any jurisdiction over such pretended claim of fees against him. Yet the Defendant contriving to injure the Plaintiff, knowingly, maliciously, and unlawfully, claimed and exercised jurisdiction over the said proceedings, and ordered that a copy of the said petition should be served on the proctors whom the same might concern. That the said Defendant, on the first of August, 1827, rejected the prayer of the Plaintiff's proctor to appear and plead to the matters alleged in the said petition. And the said Defendant, designing unduly to draw the cognizance of the said claim of fees, which especially belongeth to the

(1) V. *Dickerson* vs. *Fletcher*, ci-dessus, p. 254.

court here, to another determination, in the said Court of Vice-Admiralty before him, the said Plaintiff, and, under the false and unfounded pretext that, by resisting such claim of fees, the said Plaintiff had wilfully disobeyed the rules and orders of that court, maliciously, unlawfully, and without any lawful or probable cause, suspended the Plaintiff from the exercise of his functions, whereby the Plaintiff was injured and damnified in his business and reputation, and brought into public scandal and disgrace, and was obliged to expend divers large sums of money, including not only the pretended fees claimed by the said late registrar and other officers, but also the fees claimed, as of right, by the said Defendant, as such judge, amounting in the whole, etc.

SEWELL, CH. J.: This case has certainly been ably argued on both sides, but a wide field has been chosen for the argument, and the jurisdiction of the Court of Vice-Admiralty, instead of being partially investigated, has been generally discussed. This is an action for damages sustained by the Plaintiff, under circumstances which, as it is said, render the Defendant responsible for a judicial procedure; but the question which we have to decide has been raised by a general demurrer to the Plaintiff's declaration, and the single enquiry is, does the Plaintiff's declaration set forth a legal cause of action? If it does not, the demurrer must be maintained, and the action dismissed.

Where the members who constitute a court of justice of limited authority err in their judgment, when they are acting within the extent of their jurisdiction, they are not amenable to individuals for their conduct, in any shape whatever; but, if they assume to themselves a jurisdiction or authority which they have not by law, they become liable to the parties aggrieved, and responsible to them for the consequences of their misconduct. The reason of this distinction is obvious; while they act in the exercise of a legal jurisdiction, they act as judges and they cannot be independent in the administration of justice, if they are not protected. The errors, therefore, which they commit, are to be remedied by appeal, and there is no other mode of redress; but, when they take upon themselves a jurisdiction to which they are not entitled, they cease, *quoad hoc*, to be judges; and their proceedings being, in such case *coram non judice*, they are no longer entitled to that exemption from responsibility towards individuals, by which judges, for the public benefit, are by law defended; while they are in the due discharge of their lawful duties, and they become liable to the parties aggrieved in damages, which may be sought and obtained, by action in other courts of superior jurisdiction.

There is a wide difference, therefore, between an assumption of jurisdiction, and an improper exercise of jurisdiction; and, if the declaration does not allege facts which amount to an assumption of jurisdiction, this court cannot interfere. Now, it is stated, that the Plaintiff is a proctor of the Court of Vice-Admiralty, that the registrar, the marshall, and the crier of that court presented a petition to the Defendant, being then the judge, in which they complained of the Plaintiff, for the non-payment of certain "fees, which were due and of right payable to them, by and from the said Conrad A. Gugy," in certain cases, which had been pending in the Court of Vice-Admiralty, in which the Plaintiff had acted as proctor, and prayed that the Plaintiff should be "admonished to make payment of such arrears of fees, as, of right, belonged to them, in virtue of their respective offices." That a copy of this petition was ordered, by the Defendant, to be served on the Plaintiff, and he was required to answer it. That an order was afterwards made by the Defendant, by which, he, the Plaintiff, was suspended from the exercise of his functions, as a proctor, in the Court of Vice-Admiralty, in consequence of the proceedings had upon this petition. This is the gravamen of which he complains, and for which he demands damages. Admitting this to be true, it cannot amount to anything more than an improper exercise of jurisdiction. The claim set up was by three officers of the Court of Vice-Admiralty, against a fourth officer of the same court, the whole matter was thus entirely *inter se*, and there can be no boubt that every court must, necessarily, possess a jurisdiction over its own officers; if it has been improperly exercised in this case, the remedy is by appeal, and not by action in this court. In the case of *Leigh*, who was a proctor, in Doctor's Commons, and by that court removed from his office, for refusing to pay a fine of ten shillings, imposed upon him by order of that court, the judges of the King's Bench, in delivering their judgment, said: "Officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority, in such courts, are the proper persons to censure the behaviour of their own officers; and, if they should be mistaken, the King's Bench cannot relieve." (1) If any wrong be done in this case, the party must appeal. (2) This court is unanimously of opinion that the demurrer must be maintained.

Action dismissed. (*Stuart's Rep.*, p. 292.)

(1) 3 Mod. R., 335.

(2) See the case of *Oxenden*, Holt's R., 435.

It is laid down, in 2 Bacon's *Abridgement*, p. 388, that "although the judges are to judge according to the settled and established rules and ancient

SHERIFF.—ATTACHMENT AGAINST HIM.

COURT OF KING'S BENCH, Quebec, 19th April, 1828.

BLACK, TUTRIX, against NEWTON, and BUDDEN, Opposant.

Held: An attachment will lie against two persons, appointed, by commission from the Crown, to the office of sheriff, for the non-payment of monies levied by one of them, although the other may not have assumed the duties of the office, or acted, in any manner, under their commission. (1)

A rule was obtained in this case, ordering William Smith Sewell, and Thomas Ainslie Young, late sheriff of the district, to shew cause why attachments should not be granted against

customs of the realm, approved for many successions of ages, yet they are freed from all prosecutions, for any thing done by them in court, which appears to have been an error of their judgment ;" and, more recently, it has been laid down, as a legal principle not to be controverted, that " whoever is clothed with a judicial character, whether he be judge of a superior or of an inferior court ; whether sitting at the commission of oyer and terminer, or at the quarter sessions ; whether the forum in which he presides be of peculiar jurisdiction, sheriffs court or manor court, or whether acting under charter as the censors of the College of Physicians, all and every when called upon in their judicial capacity to decide in their respective forums, upon cases brought before them, are, although their decisions be illegal, and their judgments founded in error, equally protected from action." This was decided in the Court of Common Pleas in Ireland in Hilary Term, 1813, in the case of *Taaffe* vs. *Downes*, where the subject underwent a very full and very able investigation. The Plaintiff in that case having been arrested, on a warrant of the lord chief justice of the King's Bench, an action for false imprisonment was brought by him against that functionary ; and the judgment of Mr. justice Fletcher, from which the passage above cited is taken, the annotator ventures to pronounce one of the most profound and admirable pieces of judicial discussion, which the law reports of either country can furnish. It exhibits an union of research the most laborious, of investigation almost interminable, and of reasoning the most conclusive, with views in the highest degree liberal and constitutional. His review of the value of reports and dicta is enlightened and unanswerable, and the sketch of the character of lord Mansfield, and of the Court of King's Bench, during the time he presided over it, bespeak no ordinary powers of discrimination and of description. The Defendant, in the case in question, having pleaded, in justification of the arrest, that he was chief justice of the Court of King's Bench in Ireland, with all the immunities and privileges to the office belonging, and that, as such chief justice, he issued the warrant on which the Plaintiff was apprehended, without setting forth either the informations on which he acted, or averring that he acted on informations at all, it was argued, in suppert of the plea, that no action could be brought against a judge for any act whatsoever done by him in his character as judge. This view of the case, which was adopted by the majority of the court, and formed the ground of the decision, was combatted by Mr. justice Fletcher, who, laying down the law in the terms above cited, and, admitting it in its fullest extent, as a principle not to be controverted, as applicable to a judge, when acting judicially, yet, argued, with great cogency of reasoning, that the judges of the Court of King's Bench, being conservators of the peace of the kingdom, have, like other justices of the peace, a ministerial as well as judicial authority, and that, in this case,

(1) V. art 2272 C. C.

them, for not paying over the sum of £63, awarded to the Opposant, by a judgment of distribution of this court.

On the 16th of October, 1826, Sewell and Young were by letters patent, under the great seal of this province, appointed "to be jointly and severally sheriff of and for the district of Quebec, during pleasure, and the residence of the said William Smith Sewell and Thomas Ainslie Young, within the district of Quebec, with all and singular the powers, authority, profits, privileges, emoluments and advantages belonging to the said office and bailiwick." The rule was resisted, on the part of Sewell only, who it appeared, did not take the oaths of office under his commission. The sum in question was not levied by him, but by Young, under the order of the court to him made individually. At the time it was levied, Sewell was absent from the province, with the consent of the governor-in-chief, and an affidavit was made by Young in which he deposed that he never associated with his own name that of Mr. Sewell, for the execution of any act under their commission, but in all things acted as sheriff separately and alone.

KERR, J.: The word *sheriff*, in the singular number, not only in the grammatical, but in legal construction, shews the *entirety* of the office, and in the language of lord *Coke*, in *Curles's* case, it is but *one office*, for which two are named,

the chief justice, in issuing a warrant for the arrest of the Plaintiff, was acting ministerially (at least not judicially), and, therefore, that, not showing in his plea that he acted on informations, and so within the limits of his authority, he was answerable in an action, like any other justice of the peace; and, after many valuable observations, on the importance of judicial purity and independence, he concluded his able judgment, by regretting that the respected and incorruptible Defendant had been advised to rest his defence on the privilege of his office, which, as he observed, if maintainable in fact, amounted to a privilege of arbitrary imprisonment, instead of availing himself of that unanswerable ground of defence which, in point of fact, he had, namely, the sworn informations against the Plaintiff, on which, like any other justice of of the peace, he issued the warrant for his apprehension. (See report of the arguments and judgment upon the demurrer, in the case of *Henry Edmund Taafe* vs. *the Right Hon. William Downes, lord chief justice of the King's Bench in Ireland*, in Trinity, Michaelmas, and Hilary Term, 1812 and 1813, in the Court of Common Pleas in Ireland, by John Hatchell, Esq. barrister at law.)

MacKenna's notes on the Civil Code, p. 11.

In the case of *Beaurain, gent.*, vs. *Right Hon. Sir W. Scott*, tried on the 6th March, 1813, before lord ELLENBOROUGH, it was *held*, that an action on the case may be maintained against a judge of the ecclesiastical court, who excommunicates a party, for refusing to obey an order which the court had not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order, and that the practice of the ecclesiastical court is a matter of fact to be proved by evidence and left to the jury.

The jury found a verdict for the Plaintiff, with *forty shillings* damages, observing, at the same time, that they did not mean to throw the slightest reflection upon the highly respectable character of *Sir William Scott*. (3 *Campbell*, 388.)

to supply it. The grant is of and incorporeal hereditament, in joint tenancy, wherein there must necessarily be unity of interest, of title, of time and of possession. There can be no severance of the office, by one of the two, either by nonfeasance or misfeasance, for, it is vested in both, and may be executed by either of the co-sheriffs, or by both of them. In respect of Sewell's neglect to take the oaths which has been insisted on, this may subject him to be proceeded against, by information, but can in no degree operate as a severance of office; for, as is laid down, by the court, in Modern report (1), and referred to by Bacon, "if an officer be created by letters patent, he is a complete officer, before he is sworn, and before any investiture." And, it has been holden, even when assigned by deed, the deed executed is the instrument which the law hath appointed, instead of livery. If a different rule prevailed, it would lie in the power of either of the co-sheriffs, by refusal to assume the office, to defeat the intention of the Crown, which was, by appointing two, to insure the better performance of its duties, and to encrease the security of the suitors. It equally matters not, whether, as is alleged, Sewell absented himself from the province, immediately after the instrument had passed the great seal, and that the court, proceeding upon the sole returns of Young, had adjudged him, by name, to pay these sums; for, the office having vested, both in him and Sewell, the moment the letters patent had passed the great seal, it was not in the power of the latter to get rid of that responsibility which had equally attached to him as to his colleague.

It has been strongly urged, against this application, that we are bound to take notice of our own officers, and that the court did not, during Sewell's absence in England, recognize him as a co-sheriff; however, it must not be forgotten that, though the office is one, it might be executed by either, *jointly and severally*, nor is it universally true that a writ should be directed to and returned by both of the co-sheriffs, where there is " an unity, particularity, and identity in the office; " for, in the case of *Rich* vs. *Player* (2), where one of the sheriffs of London brought an action against the Chamberlain, the process of *venire facias* was directed to, and returned by the co-sheriff. The case of *Bethel* vs. *Harvey*, and other cases, have been referred to as establishing the same doctrine. The other grounds on which this rule has been opposed are better calculated to induce the court not to decline indulging this summary course of proceeding by way of attachment than to exonerate Sewell from responsibility. It

(1) Vol. I, p. 123.

(2) 2 Shower, 286.

has been said that he might have been appointed to the office against his will, as that he might have been ignorant of his appointment, though, it appears from his affidavit, that the uniting of Mr. Young with him in a new commission was a matter of accommodation to himself to enable him to pay a visit to England. If, in point of fact, the commission had been forced upon him, against his will, or without his knowledge, and that he had in no degree participated in the fees and emoluments of the office, during his absence, and these facts had been made out to the satisfaction of the court, we might have left the parties aggrieved to their remedy, by special action on the case. But, in the absence of any such proof, were we to refuse these applications for relief, we should renounce that unquestionable right which we have over all persons who are entrusted with a share of the justice of the court, and abdicate the trust reposed in us for the security of the suitors.

BOWEN, J.: If there be one thing more important than another, in the administration of justice, it is that courts should, at all times, hold a strict and vigilant guard over the conduct of their own officers; and that suitors, after they have obtained judgment in the courts of law, to which they are compelled to resort for justice, should meet with no impediment in the attainment of their rights, and more particularly from those persons who, under the authority and sanction of the laws, have been interposed for the execution of the King's writs and the protection and benefit of the subject. The courts here, as well as in England, are bound to notice judicially, the manner of appointing the several officers of justice, and, though no statute regulations are to be found in our books, directing the mode or manner in which sheriffs are to be chosen and appointed, yet, we have one point established beyond the possibility of contradiction, and which goes far to decide the present question, namely, that, by our own ordinance of 1785, (1) process in causes exceeding £10 sterling, issuing from the Court of King's Bench in Canada, is required "to be directed to and executed by the *sheriff* of the district, where such court shall have jurisdiction, and in which the Defendant may be or doth reside, etc." It is clear, therefore, from the words of the ordinance, that there cannot be two or more sheriffs, and whether the number of persons in the commission be two or more, they, nevertheless, in contemplation of that law can constitute but one office, the office of sheriff, and, accordingly, the letters patent do "constitute and appoint William Smith Sewell, and Thomas Ainslie

(1) 25 Geo. III, ch. II, § 1.

Young, to be jointly and severally sheriff, " and not sheriffs of the district of Quebec.

In England, the office of sheriff is rarely found to be a lucrative one, indeed, it is so far from being so considered, that persons duly nominated or pricked off, as it is termed, are subject to be amerced £500, for refusing to qualify and take the oaths of office. With us, however, the office is not an annual one, cast upon the individual by law, but is held from the Crown, as all others, during pleasure, and is an office of emolument. In the nature of things, therefore, to say that Sewell was appointed without his consent, is to say that which the facts do not warrant: on the contrary, his own affidavit shews the reason why he did not take the oaths of office, namely, that he had obtained leave of absence, from the King's representative, and that the letters patent or commission, now under consideration, issued at his own request, he having been sheriff of this district from 1822, until the 28th May, 1824, when Young was associated with him, " and constituted, with the said William Smith Sewell, to be jointly and severally sheriff of the district of Quebec, to hold the said office, during pleasure, *and the absence* of the said William Smith Sewell from the said province of Lower Canada." Now mark what follows:—These two commissions are revoked by the commission in question, of the 16th October, 1826, which appoints Sewell and Young, to be jointly and severally *sheriff*, not as in the foregoing commission of May, 1824, during the absence of Sewell, but " during pleasure, and the residence of them the said William Smith Sewell and Thomas Ainslie Young within the district of Quebec," thus, necessarly, implying the request and consent of Sewell to this arrangement, and, from the essential difference in wording of the last commission, necessarily implying also, on the part of the government, that the commission was so framed for the better security of the public, by rendering them jointly and severally responsible, and that the leave of absence to be granted as sworn to, was only granted upon such condition; otherwise, no necessity for the revocation of the former commission existed. No severance, therefore, in the office has been or could legally have been established, and although the return may have been made by Young alone, and judgment may have been rendered against him *nominatim* to pay the money, yet, in the one case and in the other, as will as in the direction of the several writs issuing from the court, it is the office and not the person that is addressed; and I cannot but hold that the return of a writ addressed to the sheriff of Quebec, during the existence of the commission to Sewell and Young, jointly and severally, signed by either of

them, as sheriff, would have been equally valid and binding, as far as the rights and interets of the public were to be affected, however, such returns might operate *inter se*, in the arrangement of their private accounts. The authorities which have been cited at the bar establish, incontrovertibly, their joint and several liability, but it ought not, in a question of this kind, to escape observation that the affidavits do not negative either of the facts that Sewell, previous to his appointment, had not given good and sufficient security for the faithful discharge of his office, or that he was not entitled to one half the fees and emoluments of the office, notwithstanding his temporary absence. The present is not, strictly speaking, a criminal proceeding, but one well known in the law of this country, by which all *dépositaires des biens de justice* are liable to be coerced by the imprisonment of their persons. (1) From these considerations, as well as those which have been urged in support of the rule, I am of opinion that the rule for an attachment in this case must be made absolute, as well against Sewell as against Young, reserving to the former all such legal recourse, as he may be advised to take against the latter, and all others in respect of the premises.

TASCHEREAU, J.: After what has fallen from the learned judges, and the authorities they have cited, it is almost useless for me to add any thing upon this question. In the commission granted to hold the office of sheriff, the administration understood that the public should have its security, that the honor of government should be respected, and that the public service should be punctually performed. The commission of the sheriff is granted to two gentlemen, to enable them to act jointly and severally. The commission gave them the power to act thus, so that the ministerial act of both became the act of each of them, and the ministrial act of each of them became the act of both and of each of them. They might act severally, so that the public service should not suffer from the absence or sickness of one of them, but the responsability of both remained the same. It was not in the power of either of them to screen himself from that responsibility, by any misfeasance, or nonfeasance, on his part, such misfeasance or non-feasance might subject him to a penalty, but could not shelter him; for, he could derive no advantage from his own fault. Although they might make, as between themselves, any arrangement they thought

(1) La contrainte par corps peut aussi être prononcée, pour depôt nécessaire, consignations faites par ordonnance de justice, ou entre les mains de *personnes publiques*, tels que les greffiers, procureurs et huissiers. Ord. de 1667, tit. XXXIV, art. 4; L. C. Deniz, *verbo* contrainte par corps.

proper respecting the discharge of the duties of the office, or the partition of its emoluments; they had no power to make any prejudicial to the public service, or, in any way, diminishing their joint and several responsibility towards the public. I do, therefore, consider it but just that they be held jointly and severally responsible towards the public. The respectable person who is the subject of this discussion, although none can impute to him any intention of depriving the public of their rights, cannot, for all that, equitably lay any claim to set aside his responsibility. It appears by the documents before us, that it was merely for his own convenience that the commission of an indivisible office was given to him, and to another, in this manner. It has not been proved that he was not to have any share in the fees; nor has it been proved that it was against his consent that he was joined with the other in the commission, on the contrary, every thing in the proceedings bears evidence that his own interest alone was contemplated, and that the commission would not have been issued in this way, had it not been for his own personal security. He committed an error in not taking proper security from his co-sheriff, and, allowing the latter to act solely; but the right of the public founded as it is in justice and equity, cannot be thereby impaired. However hard the circumstances of the particular case may be, he is responsible for the money which his partner has had in his hands, even as much as if it had been in his own, and there remains to him his recourse against that partner only. I had doubts whether the parties ought not to have proceeded by way of action, rather than by an attachment, seeing that this last mode of proceeding has in it some features of a criminal one; but, it must be taken for granted that this court depended on him as well as on the other, for the execution of its process, and, he having disobeyed the court, the remedy is by the summary process of attachment. Possessing that power, and its exercise becoming necessary for rendering justice to an individual, from whom the use of his money is unjustly withheld, we cannot do otherwise than grant an attachment against both parties.

Rule absolute. (1) *(Stuart's Rep.*, p. 298.*)*

(1) *See* Com. Dig. Officer. (A. 1.) (B. 1.) (B. 7.) (B. 11.) *Ib.*, tit. *Prerogative*, (D. 37.); 1 Salk., 168.

STATUTES.—INTERPRETATION.

COURT OF KING'S BENCH, Quebec, 20th June, 1828.

CHASSEUR, against HAMEL.

Held: That, an act declared by the legislature, generally, to be temporary, has no more than a temporary effect. Yet, a temporary act may repeal a permanent statute, if the intention of the legislature to effect such a repeal be manifest. (1)

This was an action for a trespass or *voie de fait*. The declaration stated, that the Defendant entered into the Plaintiff's house, and seized and sold certain articles of moveable property belonging to the Plaintiff, without any lawful authority; and, therefore, he prayed compensation in damages. The Defendant, by a peremptory exception, justified the entry, seizure and sale of the property in question, under the authority of a judgment, awarded by a militia court martial, against the Plaintiff, for a fine of ten shillings, incurred under and by virtue of the provisions of the ordinances of the 27th Geo. III, ch. II, and 29th Geo. III, ch. IV, for a breach of duty. To this justification the Plaintiff demurred.

In the year 1787, a permanent militia law was passed (27 Geo. III, ch. II), intituled, "an ordinance for better regulating " the militia of this province, and rendering it of more general " utility, towards the preservation and security thereof." In 1789, another ordinance (29 Geo. III, ch. IV), likewise a permanent law passed, amending the former. The statute 34th Geo. III, ch. IV, intituled, "An act to provide for the greater " security of this province, by the better regulation of the " militia thereof, and for repealing certain acts or ordinances " relating to the same," repealed the above mentioned ordinances, but enacted, "that this act should be and continue in " force, from the passing thereof, until the first day of July, in " the year of Our Lord 1796, and no longer." By the statute, 36th Geo. III, ch. XI, the last mentioned temporary act was amended, and continued to the first day of July, 1802. The next statute, upon this subject, was the 43rd Geo. III, ch. I, containing various provisions in relation to the militia, and repeals the above mentioned two temporary statutes: its duration was limited to the first day of July, 1807. The 53rd section repeals the ordinances above mentioned, enacting, " that, from and after the passing of this act, an ordinance passed in the 27th year of His Majesty's reign, intituled, etc.:

(1) V. art. 9 et 17 des S. R. Q. et la s. 7, § 48, du ch. 1 des St. rev. du Can.

also, another ordinance passed in the 29th year of His Majesty's reign, intituled, etc.; and also an act of the legislature of the province, passed in the 34th year of His Majesty's reign, intituled, etc.; (viz., the 34th Geo. III, ch. IV), and, also, another act passed in the 36th year of His Majesty's reign, intituled, etc.; (viz., the 36th Geo. III, ch. IV), should be and were thereby repealed." In the last clause of this statute, it is enacted, "that this act shall be and continue in "force, from the passing thereof, until the first day of July, "which will be in the year of Our Lord 1807, and no longer." This last mentioned statute having expired was revived by the 48th Geo. III, ch. III, from the passing of the act, on the 11th of April, 1808, and continued until the 1st ot July, 1810, and, from thence, to the then next session of Parliament. On the 21st March, 1811, by the act of the 51st Geo. III, ch. IX, it was further continued till the 1st of March, 1813, thence, by the statute, 52nd Geo. III, ch. I, until the 1st of July, 1814, Having again expired, it was revived by the statute, 55th Geo. III, ch. I, from the passing of the act, on the 8th March, 1815, and continued until the 1st of May, 1816, and, having again expired, it was revived by the statute, 57th Geo. III, ch. XXXII, from the passing of that act, on the 22nd March, 1817, and continued until the 1st of May, 1819, when it was further continued by the 59th Geo. III, ch. II, until the 1st of May, 1821, thence, by the statute, 1st Geo. IV, ch. IV, until the 1st of May, 1823, thence, by the statute, 3rd Geo. IV, ch. XXVIII, until the 1st of May, 1825, thence, by the statute, 5th Geo. IV, ch. XXI, until 1st May, 1827, and no longer.

SEWELL, CH. J.: This cause has been heard upon the pleadings, and the question submitted to us is whether the justification be a sufficient bar to the action, if the matters of fact stated in the plea be true? and this turns entirely upon the enquiry whether the militia ordinances passed in the 27th and 29th Geo. III, be or not in force.

These ordinances were passed by the governor and legislative council, under the Quebec act, before the establishment of the present constitution, and were permanent acts. But, by the Provincial Statute, 34th Geo. III, ch. IV, they were repealed, in these words: "And, be it further enacted, that, "from and after the passing af this act, an ordinance of the "late province of Quebec, passed in the 27th year His "Majesty's reign, intituled, etc., and, also, an ordinance passed "in the 29th year of His Majesty's reign, intituled, etc., shall "be, and they are hereby repealed." The Provincial Statute, 34 Geo. III, ch. IV, was not, however, a permanent act: it was a temporary act, in consequence of the 35th section, which is in these words: "And, be it further enacted, by the

" authority aforesaid, that *this act* shall be and continue in " force, from the passing thereof, until the 1st day of July, " which will be in the year of Our Lord 1796, and no longer." And, from hence, has arisen the doubt whether the ordinances repealed by this statute were repealed permanently, or temporarily. I admit the principle that a temporary act may repeal a permanent statute; but, to effect such a repeal, the intention of the legislature to do so, should, in my opinion, be manifest, for, *prima facie*, an act which is declared by the legislature *generally*, to be temporary, ought to have no other than a temporary effect. "If," says Mr. justice Bayley, speaking of the usual clause of continuance, in temporary acts, in the case of *The King* vs. *Rogers*, (1) "*this act* mean the whole " of the act, then there is an end of the question. *And, I " consider it as relating to the whole act;* and, after the time " limited by the act, for it to have effect, I consider the " question the same as if that act were no longer to be found " in the statute book." If the present case had stood upon this ground, I should have thought it to be a case in which the intention of the legislature to repeal permanently, was particularly required to be manifest upon the face of the statute; the consequence of a permanent repeal of the ordinances would have been to leave the province, its government and its inhabitants, without the protection of a militia and, so far, in a defenceless state, in the immediate vicinity of a foreign dominion; and, to presume such an intention in the legislature, by mere construction, is that which in my opinion, could not be done. But, the case stands upon better ground, namely, the construction of the legislature itself, as to the effect of the 34th of Geo. the III, ch. IV, upon the ordinances which is expressed in the subsequent statute of the 43rd Geo. III, ch. I, sec. 53. To explain this, I must observe that the 34th Geo. III, ch. IV, was continued by the 36th Geo. III, ch. I, section 53, to the first of July, 1802, and, from thence, to the end of the then next session of the provincial parliament; both these statutes, however, were repealed by the 53rd section of the 43rd Geo. III, and to prevent the operation of the ordinances of the 27th and 29th of Geo. III, which in consequence of this repeal of the statutes, would have revived, if their repeal was temporary. They (the ordinances), by the same 53rd section, *were again repealed*, during the continuance of the 43rd Geo. III; and, this clearly shews that the previous statutes, and the suspension of the ordinances which they contained, were considered by the legislature to be co-equal in their duration, and, consequently, that the original inten-

(1) 10 East's R., 575.

tion of the legislature was to effect a temporary repeal of the ordinances, and no more. Had it been otherwise, and their original intention had been to effect a permanent repeal, there would have been no necessity for a second repeal.

It will be admitted that the legistature is the best interpreter of its own intentions and of its own acts; and, as no alteration has been made, in any statute subsequent to the 43rd Geo. III, which bears upon the question now before us, and the original repeal of the ordinance was temporary and not permanent, we are of opinion that, upon the expiration of the last statute, 5th Geo. IV, ch. XXI, on the 21st of May, 1827, the ordinances revived, and have since continued to be, and still are in force.

KERR, J.: Since this question came first to be mooted, I never entertained the least doubt upon the subject. It is entirely a question of construction, that is, whether the probationary statute, 34th Geo. III, ch. IV, and the subsequent experimental acts did, or did not, operate a permanent repeal of the provincial militia ordinances? The very preamble of the 34th of the late King, shews the anxiety of the legislature to provide for the protection and security of the province; and that it considered a well organized militia as the best means towards these objects. The words, in the preamble, are, "*Whereas a respectable militia, established under proper regulations, is essential to the protection and defence of this province.*" The same words are to be found in the next, and I believe in every succeeding temporary act relating to the militia; and, are we, in the absence of any express enactment, to presume that the legislature intended, by the clause of repeal, in these temporary statutes, to withdraw from the province that protection and security which a militia is calculated to afford? There is not only an absence of a plain and clear declaration of the intention of the legislature that these ordinances should be for ever repealed; but a presumption of the strongest kind, derived from the words of the temporary acts to the countrary. There is another circumstance which has very great weight on my mind, derived from the civil law of the country. Here, the militia are, in some respects, ministers of justice, adding strength to the civil arm, as well as a military force for its defence; and, can we presume that the legislature should be so wanting to the interest of their fellow-citizens, as to meditate the depriving the civil magistrates of their support. The authority of *The King* vs. *Rogers*, is to my mind conclusive, and I am of opinion that judgment should be entered for the Defendant.

BOWEN, J.: I also heartily concur in the result of the opinion just delivered by the learned judges who have prece-

ded me, although, when the revival or non-revival of the militia ordinances first came under consideration, in another place where I have the honor to hold a seat, the opinion which I then entertained was different. This, however, proceeded from my having overlooked the second repeal of these ordinances contained in the 53rd section of the statute, 43 Geo. III, ch. I, and, having considered the question solely upon the words of repeal, as contained in the first statute, 43 Geo. III, ch. IV. The latter is intituled "An Act to provide for the "greater security of this province, by the better regulation of "the militia thereof, and for repealing certain acts or ordi-"nances relating to the same." The preamble recites that "a "respectable militia, under proper regulations, is essential to "the protection and defence of this province, and the laws now "in force are inadequate to the purposes intended." The 31st section, then, enacts that, "from and after the passing of this "act (March, 1793), an ordinance of the late province of Que-"bec, passed in the 27th year of His Majesty's reign, intituled "An ordinance, etc., and, also, an ordinance passed in the "29th year of His Majesty's reign, intituled "An act or ordi-"nance, etc., shall be and they are hereby repealed." And, by the 35th section, it is enacted "that this act shall be and con-"tinue in force, from the passing thereof, until the 1st of July, "1796, and no longer; provided always, that, if, at the time "above fixed for the expiration of this act, the province shall "be in a state of war, invasion or insurrection, the said act "shall continue and be in force, until the end of such war, "invasion or insurrection." What may have been the intention of the legislature, in any case, can only be collected from the language used by it, in its enactments, and, in every such case, it becomes a question of construction, as to what the legislature really intended. It is a clear rule that, by the repeal of a repealing statute, the original statute is revived, for, by so doing, the legislature declares that the repeal shall no longer exist; and it is the same thing, if the repealed law itself provide that the repeal shall be only temporary. But it is not true, as has been asserted, that a perpetual law cannot, in any instance, be repealed by a temporary one; for, it is an undoubted principle, in law, that a statute, though temporary, in some of its provisions, may have a permanent operation in other respects. This point came under discussion, in the Court of King's Bench, in England, in 1803, (1) when the question was whether the statute, 26th Geo. III, ch. CVIII, sec. 27, which repealed the 19th Geo. II, ch. XXXV, having itself expired, at the end of the session of parliament, after June, 1795, the 19th

(1) 3 East's R., 206, *Warren* vs. *Windle*.

Geo. II, did not revive: and lord *Ellenborough*, in delivering the opinion of the court, said "that would not necessarily "follow, for a law though temporary, in some of its provisions, "may have a permanent operation, in other respects. The "statute, 26th Geo. III, ch. CVIII, professes to repeal the 19th "Geo. II, absolutely, though its own provisions, which it subs-"tituted in the place of it, were to be only temporary."

With a view to the construction for which I formerly contended, it may not be altogether unprofitable to compare the words of repeal, as contained in the 26th Geo. III, ch. CVIII, with the words of repeal in our Provincial Statute, to which I have already referred, "And, be it further enacted, by the au-"thority aforesaid, that this act shall commence and take "place on Monday, the 24th of June, 1795, and, from thence, "to the end of the then next session of parliament, and that, "from and after the said 24th of July, 1786, the said recited "acts of the 19th, 23rd, 24th, 31st and 32rd, Geo. II, and of the "6th and 21st years of the reign of His present Majesty, *shall* "*be, and is, and are hereby repealed.*" Words of repeal, which, according to my construction of them, are in no wise more absolute than those contained in the Provincial Statute, 34th Geo. III, ch. IV. The use of the words "this act," in the foregoing clause, affords an answer to much of the argument founded upon the case of the *King* vs. *Rogers*, which has been relied on as decisive of the question under consideration. That case, so far, in my opinion, from overturning the principle for which I contended, goes directly to strengthen and confirm it. lord *Ellenborough* there said: "It is a question of *construction* on every act professing to repeal or interfere with the provisions of a former law, whether it operates as a total or a partial and temporary repeal. Here, the question is whether the provisions of the statute, 42 Geo. III, which was *originally* perpetual, be entirely repealed by the 46th of the King, or only repealed for a *limited time*. The last act recites, indeed, that certain provisions of the former act should be repealed; but this word is not to be taken in an absolute, if it appear upon the whole act to be used in a limited sense only." I trust enough has been shewn, were it any longer an open question of construction, or were it necessary to justify the opinion formerly entertained by me of the subject, that the repeal in the statute of 1793 (34th Geo. III), was then contemplated as an absolute repeal. But, the same legislature having subsequently, in 1803, (and it is upon this ground alone that I yield my former opinion to which I must still have adhered, whatever might have been the consequences), taken from me the right to enquire at present, what might have been its true intention in 1793, by again repealing the ordinances in ques-

tion; this legislative interpretation of the clause of repeal, in the statute of 1793, must, therefore, have the effect to preclude me from putting any other, or different interpretation upon the like words of repeal contained in the statute of 1803, which, after being continued by various statutes, was suffered to expire on the 1st day of May, 1827. The supposed trespass for which the Plaintiff seeks to recover damages from the Defendant, in the present instance, being acts done in pursuance of the revived ordinances, I am of opinion, with the other judges, that, if proved, they do, in law, amount to a justification of the Defendant.

TASCHEREAU, J.: This case falls within the principle of the cases cited by the Defendant. It is evident that there was no intention in the legislature to repeal permanently the militia ordinances, and that the words and good sense of the several statutes referred to require that construction. Therefore, judgment must be for the Defendant. (*Stuart's Rep.*, p. 310.)

CRIMINAL LAW.—LOTTERY.

COURT OF KING'S BENCH, Quebec, 29th July, 1828.

ISAAC ROUSSE, ex parte.

Held: That the statute, 14th Geo. III, ch. LXXXIII, has introduced into this province that portion of the criminal law of England only, which was of universal application there, and not such parts as were merely municipal and of local importance.

By that statute, the 9th Geo. I, ch. XIX, and 6th Geo. II, ch. XXXV, which impose certain penalties, on persons selling tickets in a foreign lottery, have been made to form a part of the criminal law of Lower Canada. (1)

A writ of *habeas corpus* was issued, directed to the keeper of the common gaol of this district, to produce the body of Isaac Rousse, and, by the return, it appeared that this individual was imprisoned, under a commitment, upon a conviction before two justices, for selling tickets, in and belonging to a foreign lottery.

SEWELL, CH. J.: The point submitted is distinct and single. If the statutes, 9th Geo. I, ch. XIX, and 6th Geo. II, ch. XXXV, form a part of the criminal law of this province, there has been no assumption of jurisdiction, on the part of the magistrates by whom the prisoner has been convicted of selling tickets, "in and belonging to a foreign lottery," and, consequently, the prisoner must be remanded; for the question whe-

(1) V. art. 2911 à 2923 inclus. S. R. Q., et le ch. CLIX des St. rev. du C.

ther the conviction was regular, as to the course of proceedings had in obtaining it, must be settled by certiorari.

By the 14th Geo. III, ch. LXXXIII, (1) the criminal law of England is declared to be the law of this province, " as well in the description and quality of the offence, as in the mode of prosecution and trial." A great portion of that law is of universal application, and that portion is in force in this province; but, other portions are merely municipal and of local importance only, and these are not in force. The line between them, in the absence of positive enactments, must be drawn by the legal discretion of the judges, as cases arise and call for decision, and " the inquiry," says Sir *William Grant*, in the case of *The Attorney General* vs. *Stewart*, at the rolls, " will depend upon this consideration, whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation equally applicable, in any country in which the law of England obtains. (2) Now, gaming, from its tendency to corrupt the morals of the people, is considered, by the law of England, to be an offence. " Taken in any light," says Sir *William Blackstone*, " it is an offence of the most alarming nature," (3) and all lotteries, as a species of gaming, are declared by the 10th and 11th Will. III, ch. XVII, to be public nuisances. The statutes, therefore, which have been passed, prohibiting the establishment of offices for the sale of tickets and chances in foreign lotteries, and the sale of such tickets and chances, I cannot but consider as general regulations, in furtherance of the laws against gaming, and as applicable, in this province, to the state and condition of the inhabitants, as in England. The statute, 6th Geo. II, ch. XXXV, after stating that the statute, 9th Geo. I, ch. XIX, has been found inadequate, enacts, " That, if any person shall sell any ticket in

(1) La sec. 11 du ch. LXXXIII des Statuts impériaux de 1774, 14 Geo. III, intitulé " *Acte qui règle plus solidement le gouvernement de la province de Québec, dans l'Amérique septentrionale*," est en ces termes : " Et comme la clarté et la douceur des lois criminelles d'Angleterre, dont il résulte des bénéfices et avantages que les habitants ont sensiblement ressentis, par une expérience de plus de neuf années, pendant lesquelles elles ont été uniformément administrées, il est, à ces causes, établi, qu'elles continueront à être administrées, et qu'elles seront observées comme lois, dans la dite province de Québec, tant dans l'explication et qualité du crime que dans la manière de l'instruire et de le juger, les peines et amendes qui sont par elles infligées, à l'exclusion de toute autre règle de droit criminel, ou mode d'y procéder, qui ont prévalu ou pu prévaloir dans la dite province, avant l'année de Notre-Seigneur, mil sept cent soixante et quatre, nonobstant toute chose à ce contraire à aucun égard contenue dans cet acte, sujets, cependant, à tels changements et amendements que le gouverneur, le lieutenant-gouverneur, ou le commandant en chef d'alors, de l'avis et du consentement du Conseil législatif de la dite province qui y sera établi à l'avenir, leur fera ou fera faire, de temps à autre, de la manière ci-après mentionnée."

(2) 2 Merivale's R., 154.
(3) 4 Comm., 171.

any foreign lottery, and shall be convicted of the said offence, before two or more justices of the peace, the person so convicted shall, *for every such offence*, forfeit the sum of £200, and be committed to the county gaol, there to remain without bail or mainprize, for the space of one whole year, and, from thence, until the said sum of £200, so forfeited, as aforesaid, shall be fully paid and satisfied." And, the return to this habeas corpus is a commitment of the prisoner upon conviction, before two justices, of the offence above stated.

It has been argued that the conviction is not a criminal matter, but I cannot agree in this. By the mutiny act, it is enacted, " that a soldier shall not be liable to be taken out of His Majesty's service, by any process or execution whatsoever, *other than for some criminal matter.* " In the case of *The King* vs. *Bowen*, the Defendant, on a charge of bastardy, was committed for refusing to enter into a recognizance to indemnify the parish, and the question before the Court of King's Bench was whether this was a commitment for a criminal matter, and the court held that it was, because incontinence is a crime, though cognizable only in the ecclesiastical courts, (1) The present appears to me to be a stronger case than *Bowen's*, for, here, to sell tickets in a foreign lottery is, by statute, declared to be an *offence punishable* by fine and imprisonment, and cognizable before a criminal jurisdiction of two justices of the peace, from whose judgment an appeal lies to the court of quarter session. If I err in the opinion I entertain on this case, I have the satisfaction of knowing that it may be brought before the Court of King's Bench, where my error may be corrected.

Let the prisoner be remanded. *(Stuart's Rep.*, p. 321.)

INTEREST.—PREROGATIVES OF THE CROWN.

COURT OF APPEALS, Quebec, 30th July, 1828.

On appeal from Quebec.

THE ATTORNEY GENERAL pro Rege, Appellant, and JANE BLACK, Respondent.

Held: That the Crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract, on account of a third person, in which it may be recovered from the date of service of process of the Court. (2)

(1) 5 Term. R., 156 ; *Ib.*, vol. II, p. 270, *The King* vs. *Archer.*

(2) V. art. 1067 et 1077 C. C.

Where the greater rights and prerogatives of the Crown are in question, recourse must be had to the public law of the Empire by which alone they can be determined: but, where its minor prerogatives and interests are in question, they must be regulated by the established law of the place where the demand is made. (1)

The question in this case was whether the Crown could recover interest, and, from what period, on a debt which it had guaranteed to Messrs. McTavish & Co., and which it afterwards paid, on the default of the late Mr. Goudie, who had become bound to pay the same, under a deed of lease of the King's posts, made to him by the Crown.

REID, CH. J.: Some discussion has arisen, as to the law that ought to govern the case, as it brings in question a right claimed by the Crown, and it has been contended on the part of the Respondent, that the public law of England, is the only rule we can adopt. by which the rights of the Crown can be maintained, and that according to this law, the Crown is not entitled to the interest here claimed, inasmuch as the right of the Crown to demand interests or costs, is limited to such cases as are specially provided for, and not allowed in all cases, as between subject and subject, that the debt here demanded is *sui generis*, and does not fall within any of those cases where interest is allowed, it not being a debt due by a public accountant, not stipulated by any obligation or specialty, nor even certain or liquidated.

We take the principle to be, that, in all cases where the greater rights and prerogatives of the Crown come in question, recourse must be had to the public law of the Empire, as that alone by which such rights and prerogatives can be determined. But, the debt here demanded is a *minor* right, founded on a particular contract made between the Crown and the late John Goudie, by which he undertakes, for the considerations therein mentioned, to pay this debt on the behalf of the Crown, to Messrs. McTavish & Co. This has more the appearance of a private contract, than of a debt growing due to the Crown out of its public revenues. Were the Crown even entitled to exercise a stronger recourse than that given to the subject, for the recovery of its right in this case, still, it is competent to the Crown to waive this right, and to adopt the recourse given to the subject; in which case, it appears consistent with reason, that it ought to obtain the same justice as the subject. This principle, the law of England seems to recognize, for, by the stat. of 33 Hen. VIII, ch. XXXIX, s. 54, it is enacted, "That the King, in all suits thereafter to be "taken, in or upon any *obligations* or *specialties* made, or

(1) V. art. 9 C. C.

" hereafter to be made to the King, or any to his use, shall " have and receive his just *debts, costs* and *damages*, as other " common persons used to do, in suits and pursuits for their " debts. " The proceeding here is founded upon that principle, being such as one subject might exercise against another. It is, however, unnecessary to consider whether the debt here demanded be founded on an *obligation*, within the purview of this statute, as in the decision of the question before us, we must be guided by the laws of the country: the rule we have to follow, is that laid down by *Chitty*, where he states " That, in the colonies and plantations, the minor prerogatives " and interests of the Crown must be regulated and governed " by the particular, and established law of the place where " the demand is made, " and, accordingly, " where peculiar " laws and process exist, as in Guernsey and Jersey, the King " himself, in seeking to recover his own debts therein, must " resort to such laws for redress ", which alludes not merely to the form of process to be used, but, also, to the extent of recovery to be had, and is conformable to what Gail, and other civil law writers, lay down on the subject. Now, according to the principle of law in this country, the rights of the Crown are admitted by all writers to stand on at least as good a footing as those of the subject, and, in regard of the interest to be allowed on debts accruing to it, the maxim is : *Le fisc s'en doit tenir au droit commun, pour les intérêts*, applying this maxim to the case before us, the Crown is entitled to claim interest, from the day of the *demande en justice*, (1) that is from the fourth of July, 1825, but we cannot extend it further, as there is no specific demand, or count in the declaration, on which a judgment for any greater interest can be supported. (*Stuart's Rep.*, p. 324.)

HOLOGRAPH WILLS.

COURT OF APPEALS, Quebec, 30th July, 1828.

On appeal from Quebec.

HENRY JOHN CALDWELL, Appellant, and the ATTORNEY GENERAL, on the behalf of our sovereign lord the King, Respondent.

Held: That it is essential, to the validity of a devise of real estate, that the *holograph* will, in which it is contained, should be entirely written by the testator, and closed by his signature. (2)

(1) By the 69th art. of the ordinance of Orléans, it is enacted that, "contre les condamnés à payer certaines sommes de deniers dues par cédule ou obligation, seront adjugés les dommages et intérêts requis pour le retardement du payement, à compter du jour de l'assignation qui leur aura été faite. "

(2) V. art. 850 C. C.

This was an appeal from a judgment of the Court of King's Bench, at Quebec, upon an opposition made by the Appellant, to the sale of the fief and seigniory of *Lauzon*, seized and taken in execution, on the 17th day of March, 1826, as belonging to the honorable John Caldwell, at the suit of the *Attorney General*, on behalf of His Majesty. The grounds of the opposition were, that the late Henry Caldwell, in his life time was proprietor of the said seigniory, and that he departed, this life, on the 28th day of May, 1801, leaving the same in his succession and estate. That, by his last will and testament *holograph*, wholly written and signed by himself, and which hed been duly proved before the honorable Jenkin Williams, on the 2d day of June of the same year, he did give and bequeath all his estates, real and personal, to his son John Caldwell (being his only son), subject to such limitations as were provided in the said will, and did declare it to be his will that his grandson Henry (the Opposant) or such other of his grand sons, to be born in wedlock, whom the said John Caldwell might consider as most deserving, *should inherit* the said seigniory of *Lauzon*, entire and without any diminution. The Appellant, therefore, prayed that the said seigniory might be declared not to belong to the said John Caldwell, but that, in virtue of the bequest above mentioned, the same might be declared to be the righful property of the Opposant, or of such other son of John Caldwell, thereafter to be born in wedlock, whom he might consider the most deserving: that the seizure might be declared void, and *mainlevèe* granted thereof. To this opposition were pleaded, on behalf of His Majesty : 1st, the general issue ; 2d, a general demurrer, and 3rd, peremptory exceptions. In the latter it was alleged that the pretended substitution or entail, in the said opposition mentioned, was not, within six months after the decease of the late Henry Caldwell, or at any other time, published or enregistered in the royal court nearest to the domicile of the said Henry Caldwell, at the time of his decease, being the Court of King's Bench for the district of Quebec, or in any other court, as required by law. (1) The opposition was subsequently amended, but the pleadings remained the same. Issue having been joined upon these pleadings, it was agreed, between the parties, that the parol evidence which had been legally adduced, in the same cause, upon an opposition of William Meiklejohn, in his capacity of tutor to the substitution or entail alleged to have been created by the will above mentioned, should be taken to be evidence upon the opposition of the Appellant. The will referred to in the

(1) V. art. 938 à 943 inclus. C. C.

opposition, when produced, commenced as follows: "In the name of God, Amen. I, Henry Caldwell, of Belmont, near Quebec, etc." It was proved to have been wholly written by the late Henry Caldwell, but his signature was not subscribed to it, and the will had no date. The parties having been heard, the Court of King's Bench pronounced its judgment, on the 13th day of June, 1827, in the following terms: "Considering " that the will of the late Henry Caldwell, in his lifetime, " receiver general of this province, was not executed according " to the laws of Canada, or to the form prescribed by the " laws of England, so as to pass the estate or seigniory of " *Lauzon*, it is adjudged and declared that the opposition of " Henry John Caldwell, in this cause fyled, be, and the same " is hereby dismissed." From which judgment, the present appeal was instituted.

REID, CH. J: To the opposition in this case, different pleas have been made, and it has been objected, on the part of the Respondent: 1. That the will in question was without legal effect or validity, the same not having been written and signed by the late Henry Caldwell. 2. That the devise therein and thereby made, containing substitution in favor of the Opposants, but not having been published in the King's courts, nor enregistered in the public registers thereof, as by law required, the devise in question was, therefore, wholly null and void. The first point to be considered is, whether the writing produced and proved, as the last will and testament of the late Henry Caldwell, the same having been written by him, but neither dated or signed, that is, subscribed by him, can, nevertheless, be considered, under the laws of the country, as a good and valid holograph will, sufficient to vest in the Opposants the right they claim. Among the arguments adduced in support of the will, it has been strongly urged, that, as the subject, in this country, is at liberty to adopt any form, in making his will; known either by the laws of Canada, or by the law of England; and, as the form here followed, is one known by the law of England, in as far as regards the disposition by will of chattel interests, and no distinction being made, or known, by the laws of Canada, as in England, between the form of a will of real, and a will of personal property (any from, when legal, being sufficient to pass all kinds of property, by the laws of Canada), the form used by the late Henry Caldwell, being recognized here as a legal form, must necessarily have the effect to pass the real, as well as the personal estate, inasmuch as the effect of such will must be determined by the laws of Canada, where the property lies. That, although the will in question has not been subscribed or closed by the *signature* of the testator, yet, his

name being written by him, at the commencement of it, in these words : "*I, Henry Caldwell, esquire, of Belmont*, etc," it is a sufficient signing, and so held by the decisions of the courts in England, on the stat., 29th Charles II. Consequently, the will so signed must be held sufficient to operate the devise contended for, by the laws of Canada. This argument, however, cannot be admitted as correct in principle, for, if we consider the British statute of the 14th of the late King, (commonly called the Quebec act), it is evident that the forms of wills thereby introduced, were the forms which, in England, were admitted and known as having the effect and operation of a sufficient conveyance and disposition of the estate of the testator. These were extended to this colony, no doubt, for the benefit of such of the King's subjects settled in it, as might be unacquainted with the forms then followed under the French laws, in order to facilitate them in the disposition of their property, and to enable them to transfer it by will in Canada, as easily and effectually, as they could have done in England. It certainly cannot be inferred from this statute, that the form of a will, operating only as a bequest of a chattel interest in England, should have a greater effect in Canada than it had in England, or, that it should operate a devise of the realty in Canada, where, by the laws of the country, it was insufficient for that purpose; the words of the statute are very clear and plain : "That every person, having lands or goods in the province, or who has a right to alienate the same, in his life-time, by deed of sale, gift or otherwise, may devise or bequeath the same, at his or her death, by his or her last will or testament, such will being executed, either according to the laws ef Canada, or according to the forms prescribed by the law of Engand." The plain meaning of which is, that every person desirous of devising his lands, in Canada, by a will in the English form, must follow that form, in such manner as would operate a devise of land in England, and the same thing in regard of chattels. It never was meant, or intended, by this statute, that the forms known by the laws of the two countries could be so amalgamated, that a person might adopt, in part, the form of a will recognized by the law of the one country, to give effect to an insufficient form under the laws of the other, for this would be adopting a form unknown to the laws of either. The distinction is sufficiently marked, that the forms of the one country, or of the other, must be followed throughout, and the form adopted must be efficient, according to the law of that country from which it is taken, the forms of the one country are introduced, the forms of the other are confirmed, as two distinct modes for the conveyance of real property by will. The will in

question, therefore, must, in its form, be such, as by the laws of England, or by the laws of Canada, will operate a devise of the real estate. Now, according to the laws of England, it must be admitted, on all hands, that this will can have no effect, in devising the realty, we must, therefore, consider it, in point of form and effect, under the laws of Canada.

It is called an holograph will, and, by the testimony adduced, appears to have been wholly written by the late Henry Caldwell, but is neither dated or signed by him, and, on this account, the objection appears to have been taken that it cannot, in point of form, be considered as a will, nor have any effect whatever, under the law of Canada. The rule of law, as established by the 289th article of the Custom, is "*pour* " *réputer un testament solemnel, est requis qu'il soit écrit et* " *signé du testateur, etc.:*" This is the holograph will, and the two requisites, in point of form, are, that it shall be *written* and *signed* by the testator. Now, if we can find that, by the decisions of the courts of justice, or, by any interpretation had upon this article, the signing thereby required, has or can be construed in the same manner as it has been construed by the courts in England, under the stat. 29 Charles II, we will certainly allow the full effect of such construction, and declare that the testator, by writing his name at the commencement of this holograph will, has thereby sufficiently complied with the law which requires *qu'il soit écrit et signé du testateur.* Among the commentators upon this article, little is to be found applicable to the question, they, in general, assume the words of the law, by saying, that the will must be written and signed by the testator, but, as to the place where such signature should be affixed, it would not seem to have been considered by them as a matter of doubt or difficulty, so as to excite observation or comment; the few who have intimated any opinion on the subject, we shall have occasion just now to notice. The authorities cited by the Appellants we have carefully examined, but they are far from establishing the principle contended for. The case cited from Denizart (1) is given by that writer as an authority to shew, that an holograph will, without *a date*, was not, on that account, null and void; but, in regard of the *signature*, this case, rightly considered, seems to bear against the Appellants, as it certainly implies that the signature there made, was the last act done by the testatrix, and, in confirmation of all that had preceded it; for, the signature of the testatrix, after the words, *c'est moi qui l'ai cacheté en cire rouge et en chiffres*, although the first thing seen on looking at the will folded up, was the last act done,

(1) Denizart, *verbo* testament, n° 35.

and, so, far from being considered as the commencement of the act, it was the close and confirmation of it, and, by the formality of sealing and signature, it was giving an approbation to the writing it enclosed, as effectually as if the signature had been attached thereto; but, neither in this case, or in any to be found touching the execution of an holograph will, has it been held, that the name of the testator, written at the commencement of the will, has been considered as the signing of it. It is true that, in England, the judges, by giving a great latitude to the words of the before mentioned statute, have held, that the writing of the name of the testator, at the beginning of the will, is to be considered as a sufficient signing, within the intent and meaning of that statute, and it may, therefore, be asked, why the judges here cannot adopt the same favorable interpretation, in regard of an holograph will made under the laws of this country, but this we are unable to do, and the strong reason against it is, that we have no witnesses here, as required by the Britsh statute who can declare and testify to us, that the testator made and published this writing, as his last will and testament, we are left in doubt, as to the material fact, what was the intention of the testator respecting this paper, whether it contains all his dispositions, or whether it was meant only as a mere *projet* or instructions, whereby to draw a more formal instrument, at some future period. But such of the law writers who have touched upon the point, of what constitutes the execution of a will, by the signature of the testator, and where that signature ought to be placed, put the question beyond all doubt. *Ferrière* lays down the general meaning of that word, he says, "Signature est la " souscription, ou apposition de son nom au " bas d'un acte, mise de sa propre main." (1) *Pothier*, in speaking of the *testament olograph*, says: "La signature doit être à la fin de " l'acte, parce qu'elle en est le complément et la perfection." (2) *Ricard*, speaking of wills in general, says: " Quant au lieu où les signatures doivent être placées, il n'y a " pas de doute qu'il y a obligation de les apposer à la fin de " l'acte, et, après qu'il est achevé, attendu que, faisant foi par " elles-mêmes, et servant de sceau à l'acte, elles ne peuvent " point valablement être faites, que lorsque l'acte est accompli," " (3) *Bourjon* says: C'est la signature à la fin du testament " olographe qui en est le sceau," and, in the note, he adds: "En " effet, c'est cette signature finale qui en est le sceau, et sans la- " quelle il y a tout lieu de présumer que l'écrit n'est que le

(1) Dictionnaire de droit, *verbo* signature.

(2) Don. test., ch. 1, art. 2, § 2, p. 299.

(3) Tr. des donations entre vifs, vol. I, n° 1531, p. 347.

" simple projet d'un testament." (1) A presumption, such as here alluded to is, in some measure, confirmed by the evidence in this cause, that this paper writing was intended by the late Henry Caldwell, merely as the *projet* of a will; we refer to the deposition of Mr. Têtu, the notary; he says, that, being at Belmont in the spring of the year, 1809, the deceased, Henry Caldwell, requested of the witness to return there, in two or three days, as he, Mr. Caldwell, was desirous to make his will, and, after a little reflection, he added, that, in order to facilitate the witness, in drawing the will, he would reduce his intentions into writing, and send for the witness, at another day; but, the witness was not again sent for, before Mr. Caldwell died. This presumption is also further strengthened, by looking at the existing will of the late Mr. Caldwell, regularly executed before the same notary, and leads to a belief, that the paper writing in question, without *date* and without *signature*, was an unfinished act, and intended only as instruction for drawing a more formal will, in the manner he had heretofore done. But these presumptions, whether well or ill founded, are of little moment here, as they cannot affect the principle of law. (2)

In addition to the authorities just cited, we would also refer to the opinion of a celebrated writer of the present day in France Mr. Toullier, not that we consider his opinion as an authority to ground our decision, but, as he has written on the same question, on a law, the same in principle as the 289th article of the Custom of Paris, with this difference only, that, by the law on which he writes, the will must be *dated*, as well as *written* and *signed* by the testator; we give his opinion, merely to shew the uniformity of jurisprudence on this point, as well under the former system of law in France, as at the present day. He says: " C'est la signature qui rend " parfait le testament olographe, elle seule atteste qu'il est " l'acte propre du testateur, sans elle, il ne serait qu'un " projet. " (3) And he adds: " La place de la signature n'est " pas variable et indifférente, comme celle de la date. Cette " place est marquée par la nature des choses, elle est la marque " de l'accomplissement de la volonté du testateur, et de la " dernière approbation qu'il donne à l'acte. Il est donc néces- " saire que toutes les dispositions du testament soient terminées " par la signature. " (4) From all the authorities which have come under our notice, as well as those cited, we are satisfied,

(1) Bourjon, vol. II, p. 304, n° 6.

(2) *Griffin* vs. *Griffin*, 4 Ves., 197.

(3) 5 Toull., *Des Dispos. test.*, p. 346, n° 372, and p. 349, n° 375.

(4) *Ib.*, n° 375.

that, in order to render a holograph will valid, it must be closed and confirmed by the signature of the testator, as constituting the signing which the law requires. And we are, therefore, of opinion, that the paper writing here produced, cannot be received as the last will and testament of the late Henry Caldwell.

There has been another point raised in argument, of which we must here also take notice, which is, that this holograph will, however insufficient, in point of form, yet, having been confirmed, by the Defendant, who alone had an interest therein, and, at a time when there existed no claim against him by the Crown, it ought, therefore, to have the same force and effect, as if it had been originally made in legal form. But, the court does not consider itself called upon to give any opinion upon this question, however material it may appear,as it is not raised by the pleadings, in any way to require, or warrant our decision thereon. This was necessary, as the time when this confirmation was made, the mode and manner of making it, and the consequences to accrue therefrom, by giving legal operation to an instrument, in itself, of no validity, but which, by means of such confirmation, became effectual and binding, were matters essential to have been averred, in the opposition and claim of the Opposants, as upon all these matters of fact and of law, the Crown was entitled to raise a contest and to be heard, but, as nothing of this appears on the record, by which alone the court must be guided, in giving its decision, we cannot now take notice of this question. As to the other questions agitated on the pleas to this opposition, they need not be noticed, the opinion we now hold, as to the insufficiency of the will, rendering this unnecessary.

Judgment affirmed. *(Stuart's Rep.*, p. 327.*)*

This case was *carried* to the Privy Council, and here follows the judgment of Their Lordships.

PRIVY COUNCIL, 13th May, and 21st June, 1834.

Present : the Vice-Chancellor, Mr. justice Parke, Mr. justice Bosanquet, the Chief Judge of the Bankruptcy Court, Sir E. H. East, Sir A. Johnson.

WILLIAM MEIKLEJOHN, tutor, etc., Appellant, and THE ATTORNEY GENERAL of Lower Canada, and Sir JOHN CALDWELL, Respondents.

The Quebec act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or

chattels, in his or her lifetime, may devise or bequeath the same, at his or her death, by his or her last will and testament, such will being executed, either according to the laws of Canada, or *according to the forms prescribed by the laws of England. Held*, that a will, invalid according to the French law, and not executed according to the provisions of the statute of frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England.

By the 10th section of the Quebec Act, 14th Geo. III, ch. LXXXIII, it was enacted, "That every owner of lands, goods or credits, in the said province, who has a right to alienate the said lands, goods or chattels, in his or her lifetime, by deed of sale, gift, or otherwise, may devise, or bequeath the same, at his, or her death, by his, or her last will, and testament, any law, usage or custom theretofore or then prevailing in the said province to the contrary thereof, in anywise, notwithstanding, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England."

The Provincial Legislature of Lower Canada, subsequently, passed an act, 41st Geo. III, ch. IV, which, after reciting the 10th section of the Quebec Act, and that doubts "and difficulties had arisen, in this province, touching the true intent and meaning of the said act, in this respect," provided "that it shall and may be lawful, for all and every person and persons of sound intellect and of age, having the legal exercise of their rights, to devise and bequeath, by last will and testament, whether the same be made by a husband or wife, in favor of each other, or in favor of one or more of their children, as they shall see meet, or in favor of any other person or persons whatever, all and every his or her lands, goods or credits, whatsoever be the tenure of such lands, whether they be *propres, acquets* or *conquets*, without reserve, restriction or limitation whatsoever, any law, usage or custom to the contrary thereof in anywise notwithstanding: provided always, that it shall not be lawful for a husband or wife, making such last will and testament, to devise and bequeath more than, his or her part or share of their community or other property and estate which he or she may hold, or, thereby, to prejudice the right of the survivor, or the customary or settled dower of children; provided also, that the said right of devising, as above specified and declared, shall not be construed to extend to a devise by will or testament in favor of any corporation or other persons in mortmain, unless the said corporation or persons be by law entitled to accept thereof. And, whereas doubts have arisen touching the method now followed of proving last wills and testaments, made and executed according to the forms prescribed by the

laws of England, before one or more of the judges of the courts of civil jurisdiction in this province: be it, therefore, further enacted, that such proof shall have the same force and effect as if made and taken before the Court of Probate."

Mr. Henry Caldwell, the proprietor of the seigniory of *Lauzon*, made a will, which commenced in these terms: "In the name of God; Amen. I, Henry Caldwell, of Belmont, near Quebec, being of sound mind and memory, blessed be God, and seeing the uncertainty of every thing in this world, do now make and publish this my last will and testament, hereby revoking all and every other will heretofore made." The whole of this will was in the testator's handwriting, but he had not subscribed his name at the end of it; it was attested by no witnesses, and there was no date affixed to it; but it was argued in the courts below, that as one of the legacies was to Mr. Bowen, by the title of Attorney General, who was not appointed to that situation until 1808, that it must have been written subsequently to that year. All doubt, however, on the latter subject was removed, by an affidavit of the testator's housekeeper, which was taken in England, after the decision of the courts in Canada, and of which the Appellants were admitted to the benefit, under an order of the judicial committee of the 7th December, 1833. She deposed that she had seen the testator write the will, a few months before his death (which took place on the 28th of May, 1810); that he told her it was his will, and ordered her to lock it up in his escritoir, which she accordingly did.

The principal, and, indeed, the only question that was argued at length before the judicial committee, was as to the validity of this will to pass the seigniory of *Lauzon*. It was supported by the Appellant, who appeared on behalf of Mr. H. Caldwell's grandson, who was a devisee under it, and oppugned by the counsel for the Crown, which had distrained upon the seigniory, for a debt due to His Majesty from Sir *John Caldwell*, the son and heir-at-law of the testator. The Court of King's Bench, at Quebec, on the 16th of April, 1827, decided that the will had neither been executed according to the laws of Canada, nor to the forms prescribed by the law of England, so as to pass the seigniory; and this decision was confirmed by the judgment of the Court of Appeals, on the 30th of July, 1828, which was now appealed from.

Sir CHARLES WETHERLL (K. C.) and *Knight* (K. C.), for the Appellants: This will is a good holograph will, capable of passing real estates by the law of France. The Custom of Paris, by which the province of Lower Canada is governed, only requires, with regard to holograph wills, that they should be "écrits et signés de la main et seing manuel du

testateur." These last words are nearly identical with those of our statute of frauds, which requires that a will, to pass freehold estates, should be "signed by the party so devising the same." The same mode of signature ought therefore to be held sufficient to satisfy the requisitions of both law; and it has long been established, in our courts, that the signature, by a testator, of his name, at the beginning of a will, as in the present case, is, for the purposes of the statute of frauds, equally good as his subscription of it at the end, in the more ordinary method. *Lemarque* vs. *Stanley*, (1) *Ellis* vs. *Smith*. (2) The French courts have come to nearly similar decisions, as in the case of the widow Voilain, reported by *Denizart*, (3) where a holograph will was held good, although the whole of it was written upon the first page of a sheet of letter paper, between which there intervened two blank pages before the signature, which was on the 4th page. Another case, of a precisely similar nature, (4) is reported by the same author, which was decided in the same way, upon appeal, by the Châtelet of Paris. The want of date does not vitiate a holograph testament in Canada, although it would have done so in France, under the old *régime*, on account of the provisions of an ordonnance of 1735; but it has been decided, after considerable discussions, in the case of the Sieur *Destouches*, (5) that this ordonnance did not extend to wills made in the French American colonies.

If this would not, however, enure to pass lands, according to the law of France, still it was executed according to the forms of the law of England, so as to pass all copyhold and leasehold lands. There is nothing in the Quebec Act to oblige the possessor of a seigniory, in Canada, to observe in his will the forms required by the law of England to pass freehold property. It is a fallacy to say, that the absolute property of lands held under the Custom of Paris is a freehold, for that is a species of property recognized only by the law of England. If it had been the intention of the framers of that statute to require the attestation of three persons to all wills of real estates in Canada, they surely would have inserted the word "attested," as well as "executed according to the forms prescribed by the law of England." Any doubts which formerly might have existed are, however, removed by the provincial act, which was passed expressly for the purpose of facilitating the

(1) 3 Levinz, 1.

(2) 1 Ves. jun., 1.

(3) *Verbo* testament, n° 35.

(4) Denizart, *verbo* testament, n° 36.

(5) *Ibid.*, n° 30.

exercising of the testamentary power. The last clause, indeed, clearly shews the views of the Canadian legislature, because it provides for the probates of wills, executed according to the forms prescribed by the law of England; but wills of freehold land, as is well known, require no probate, and the interpretation, therefore, which must be put on those expressions is, wills executed in such manner as is requisite by the law of England for passing personal property, or real property, not being freehold. This will is perfectly valid for either of the two latter purposes, by English law, and, therefore, is valid for every purpose in Canada.

The SOLICITOR GENERAL (Sir C. Pepys) and WIGHTMAN, for the Respondents.

There is no principle better established, in the law of France, than that the signature of a testator must be affixed at the end of a holograph will, in order to denote that it is a complete and perfect instrument. (Pothier, *Traité des testaments,* ch. I, sec. 2.) The two cases cited from *Denizart* are quite in accordance with this principle. What does the length of interval between the will and the signature signify, so that the signature is at the end of it?

The Provincial Statute was passed for the purpose of explaining all doubts as to the subject matter of Canadian wills, not as to the mode of executing them. Its effect is to enable the landholder to devise the whole of his real property to whom he pleases, instead of a part only of it, as was the case under the French law, not to empower him to dispense with the useful formalities of either attestation or signature. The only question is, what is the meaning of the words, "forms prescribed by the English law?" and, as there are no forms prescribed by that law as to the execution of wills of personal property, it is clear that they must mean those forms which it requires for passing of freehold property. This will, therefore, must, either according to the law of France, or of England, be held invalid, as to the estate in question.

The VICE-CHANCELLOR: Their Lordships are of opinion, that, upon the true construction of the act., 14th Geo. III, ch. LXXXIII, s. 10, a will disposing of lands or goods in Canada will be good, if executed according to the law of Canada, which requires the same form for a will of lands as for a will of goods; and that a will disposing of goods in Canada will be good, if, by the law of England, it were sufficient to dispose of personal estate; but, that a will disposing of lands in Canada, if it be not executed according to the law of Canada, will not be good, unless it is made according to the law of England. The words of the section are, "executed, either according to the laws of Canada, or according to the forms

prescribed by the laws of England." By the English law, no form is required for making a will of personal estate, but the laws of England have prescribed certain forms for making valid wills disposing of freehold lands; and Their Lordships are of opinion, that those forms are referred to, by the statute, when it speaks of a will of lands executed according to the forms prescribed by the laws of England, and that the term "executed" comprehends the making, subscribing and attesting, in the manner directed by the statute of frauds.

Their Lordships are also of opinion, that the provincial act of 41 Geo. III, did not intend to alter, and has not altered, the law with regard to the form of making wills in Canada, but does, by the use of the words "devise or bequeath," and "whatsoever be the tenure of such lands," and, by referring to a devise by will in mortmain, shew that the Canadian legislature considered the act of 14th Geo. III, to refer to devises of land, technically so called in the law of England. It is plain, upon the cases and authorities which have been referred to, that the will in question, though holograph, and admitted to be final, was not signed according to the old law of France, which is the law of Canada, and requires that the signature shall follow the disposing part of the will; and, as an English will of lands, it is clearly null.

Therefore, without entering into the question of construction that might arise on the will, Their Lordships are of opinion that the judgment below must be affirmed, and the petition of appeal dismissed, with costs, to be taxed in the usual manner, as it is a petition of appeal against the judgment of the superior provincial court, affirming the judgment of the court below. (*Stuart's Rep.*, p. 581; 2 *Knapp's Reports*, p. 328. Vide *supra*, p. 282.)

ROAD SURVEYOR.—PUBLIC ROAD.—TRESPASS.—JUSTIFICATION.

COURT OF KING'S BENCH, Quebec, 20th October, 1828.

CANNON, against LARUE and others.

Held: That an action of trespass, against a road surveyor, who had acted under a judgment of the Court of Quarter Sessions, for entering the Plantiff's close, and destroying certain buildings, must be brought within three months after the right of action accrued, as provided by the statute, 36 Geo. III, ch. IX, § 76. (1)

(1) Ce *Statut du Bas-Canada, de 1796, 36 Geo. III, ch. IX*, n'est plus en vigueur. Aujourd'hui, sous le Code municipal, l'ouverture d'un chemin municipal se fait par un règlement (art. 526 C. M.) ou par un procès-verbal (art. 794 et s. C. M). L'expropriation pour les fins mnnicipales se fait sous les articles 902 et s. C. M., et les travaux de construction, d'amélioration ou d'entretien ordonnés sur les chemins, se font sous la surveillance de l'inspecteur de voirie (art. 376 C. M).

Such action may be maintained against persons, acting under the orders of the road surveyor, who do not plead a justification of their conduct.

This was an action of trespass for breaking and entering the Plaintiff's close, and destroying a stable and other buildings. One of the Defendants, Larue, pleaded in justification, that he had acted as road surveyor, under a judgment of the Court of Quarter Sessions, homologating a *procès-verbal* by which he was directed to open a public road through the ground on which the alleged trespass was committed. The other Defendants pleaded the general issue only.

KERR, J.: It has been contended, by the counsel of Larue, that this action should have been brought within three months after the cause of action arose, as provided in the 76th section of the 36th Geo. III, ch. IX, § 76, in default of which it could not be maintained. In answer to this objection, it is said that the magistrates, by ordering this road to be opened, had exceeded their jurisdiction, and, in this respect, the officer had acted, not *virtute officii*, but *colore officii*, and is not protected by this clause; and that this distinction, in terms, was taken by lord *Kenyon*, as referred to in Tidd's practice. Now, I take the distinction there made, between *virtute officii*, and *colore officii* to be no more than that when a magistrate, in the exercise of authority, the subject matter of which is within his jurisdiction, decides, in a pure and upright mind, but is mistaken in his opinion, and orders an act to be done which exceeds his authority, he is excused, and all persons acting under his warrant. In the humane view of the law, he then acts *virtute officii*. But, when, with a judgment knowing that the act was not within the scope of his jurisdiction, and, a heart impure, he shall wilfully pervert the law, to gratify private purposes, then, the law considers him as having acted *colore officii*, and withholds from him its protection. If, indeed, it were otherwise, the clause in the act would become of no use or avail; for, acting within the limits of his authority, and, in strict observance of the powers granted, he would be as well shielded from the undue exercise of his jurisdiction, as if no such clause had been inserted. So far as respects Larue, it is unnecessary for us to enquire, whether, having obeyed the authority given to him by the Quarter Sessions, or, if that court had abused its authority, in ordering the street to be opened, whether the action should not have been brought against the magistrates, and not against him (on both of which points I could have no difficulty in making up my mind). I am of opinion that, after the expiration of the three months, this action cannot be maintained against the officer acting under the statute, and that, as regards him,

the action must be dismissed. As to the two other Defendants, they stand in a different situation, for they have severed in their defence, and have not pleaded a justification, as that they came in aid of the officer, but have rested their defence entirely on a general plea, whereby they have put in issue the commission of the trespass only, and this has been completely proved against them both. One of them, Mailhot, appears to have been an active instrument in demolishing the buildings; and, although the other, Phillips, acted with more caution, yet, we find him present countenancing the act of trespass: that his foreman assisted in it, and he himself sent for rum to be given to the men who actually pulled down the outhouses, and that the whole was done in an outrageous manner. It only, therefore, remains for the court to assess the damages, which, all circumstances considered, the court assesses at £50, and for this sum judgment (1) will be entered up against both of them, with costs.

VALLIÈRES and SCOTT, for the Plaintiff; GUGY, ROMAIN and SMITH, for the Defendants. (*Stuart's Rep.*, p. 338.)

JURISDICTION.

COURT OF KING'S BENCH, Quebec, 9th December, 1828.

WILSON, against KERR.

Held: That the court has no jurisdiction, in an action against a judge of the Court of Vici-Admiralty, to recover back money paid to him as fees in a suit determined in that court, but the remedy is by appeal to the high Court of Admiralty in England, or to the King in his Privy Council.

Semble, That the right of the judge of the Vice-Admiralty, to exact fees, is of an immemorial usage introduced into this country after the conquest.

Certain fees were paid by the Plaintiff to the Defendant, as judge of the Court of Vice-Admiralty for the province, in a suit lately pending before him, for subtraction of mariner's wages, and this was an action to recover back the fees so paid, amounting to the sum of £15, for the express purpose of trying the Defendant's right to exact them.

WILLAN, for the Plaintiff, admitted that a court having jurisdiction over the subject matter or cause of action, has jurisdiction equally so over that which is necessarily incidental to it, but that the sum demanded ought not to be considered as costs of suit, but as a sum of money paid, under the colour

(1) Affirmed in appeal, the 30th April, 1830.

of fees, to the judge himself, having no right to take such fees; 1. Because, if the right exists at all, it must be founded either upon express enactment or immemorial usage, neither of which had been shewn; 2. Because, by the provincial ordinance of the governor in council of the year 1780, a sum of £200 per annum was allowed to the then judge of the Vice-Admiralty, in lieu of fees; and 3. Because it is in evidence that the Defendant receives the annual salary of £200, as judge of the Vice-Admiralty Court.

PRIMROSE, for the Defendant, said that this court could not entertain the question, inasmuch as it relates, exclusively, to another court, the Vice-Admiralty having competent and original jurisdiction over the subject matter before it, viz., a suit for mariners's wages, to which the question of costs and the amount thereof was purely incidental, and could only be corrected by an appeal from the judgment to the high Court of Admiralty in England, or by a petition to the judge of the Vice-Admiralty to revise the taxation.

By the consent of parties the court pronounced its judgment in vacation.

BOWEN, J: The Defendant has put upon the record his commission under the great seal of the high Court of Admiralty in England, which delegates the necessary power to him as such judge, with the right of taking fees as exercised, not only by the high Court of Admiralty, but until very lately by the judges in every other court in England. It is in evidence that, upon the conquest of Canada, the first governor general Murray, in 1764, by letters patent, appointed Mr. *Potts*, judge of the Vice-Admiralty for the province of Quebec, and granted the office to him, with the right to take and receive all such fees and emoluments as any other court in the colonies took, or, of right, ought to have taken in any of them. Here, then, *in limine*, we find, that, on the first introduction of the office into Canada, fees were granted to the judge. Again, in September, 1769, in the commission issued by the gevernor to Mr. *Johnson*, we find these words, "with power of taking and receiving such salary as should hereafter be appointed, and, in the meantime, to take all such profits, advantages and emoluments to the said office belonging, with such fees as should be approved by His Excellency." The ordinance of 1780, for regulating the fees of various offices in the province, which the Paintiff has much relied on, was merely temporary, and expired long before the appointment of the Defendant to be the judge of the Vice-Admiralty, it contained, however, a legislative recognition of the right to fees, by granting to the then judge, a salary of £200 *per*

annum, in lieu of fees. (1) The ancient registers of the court also prove that the former judges did receive fees, in one of them, we find a bill porrected in a suit for seamen's wages, in which the following item was inserted by the proctor; "Paid to the judge, £4 19s." Now, as this court, the King's Bench, has no appellate jurisdiction over the decisions of the Vice-Admiralty Court, we cannot try that which the judge has done in the exercise of his office, in any matter within the scope of his jurisdiction, (2) although he should have proceeded erroneously. The case of *Ackerly* vs. *Parkinson*, (3) wherein it was held "that an action on the case is not maintainable, if the court has a general jurisdiction over the subject matter," is directly in point. Again, it is distinctly stated in *Blackstone's* Commentaries, (4) that, when the Admiral's Court has jurisdiction over the original cause of action, it has jurisdiction also, over all consequential questions, although properly they may be determinable at common law. We know not under what circumstances the salary of £200 *per annum* is paid by His Majesty to the present judge, but this we know, that the warrant does not express it to be in lieu of fees. This action must, therefore, be dismissed, and the Plaintiff left to his remedy by an appeal from the Court of Vice-Admiralty to the high Court of Admiralty in England, if he see fit, or he may appeal from this judgment to the King in council.

TASCHEREAU, J.: We are not called upon to determine whether it is, or is not expedient that the judge of the Vice-Admiralty should receive fees, this belongs to the legislature, but to decide, according to the law as we find it, whether it be good or bad. The establishment of the court of Vice-Admiralty was a consequence of the conquest. There has been no particular statute, either of the imperial parliament or of the provincial parliament, specially providing for the establishment of this court in Canada. The office of judge of this court cannot be considered a new office; but the court and its officers are established in this country upon the same footing as in England, with the same powers, the same privileges and the same rights. Amongst these rights is the right of receiving fees, established by an immemorial usage, equivalent to a positive law, which usage has been recognized and acted upon in this country. This usage, in England, is more ancient than the statute of

(1) Par la s. 12, du ch. CXXXVIII, de Statuts revisés du Canada, le traitement du juge de la Cour de Vice-Amirauté de Québec est de $2000 par année.

(2) Wood's *Institutes*, 498; 1 Chitty's *Pleading*, p. 66.

(3) 3 Maule and Selwyn, 424.

(4) Vol. III, p. 188.

Edward III, which prohibits the taking of fees without the authority of parliament, after the making of the statute, but does not revoke the laws and usages previously established. This usage must then be considered as one established by competent authority ; it has been followed in the colonies, and has been introduced into this province with the Court of Vice-Admiralty. It is a law from which we have no right to derogate, unless authorized by an act of parliament. Now, there is no law in force which derogates from this usage. It is true that there was an ordinance which derogated from it, for a time, but the legislature has not thought proper to continue this temporary act, it is not for us to supply this. The ordinance, then, so far from being repugnant to the receiving of the fees, formally recognizes the usage under which they are received. The Sovereign, in his commission conferring the office of judge, grants it with all the fees lawfully appertaining to it. We cannot of ourselves take them from him. The question of fees is accessary to the principal litigation, and is, therefore, of the jurisdiction of the Court of Vice-Admiralty, and not of this. If the judge has erred, it is only by an appeal that his error can be rectified. If this court could at all interfere in this matter, at utmost, it could only be when the judge received fees not sanctioned by the table of fees of the Vice-Admiralty, but there is nothing of the kind in this case alleged or proved. The only question being whether the immemorial usage of receiving fees in the Admiralty by the judge, which has also obtained in the other British colonies where Courts of Admiralty have been established, is in force in this country, and, thinking as I do, that it is, I concur in the opinion of the court, that the question is one of costs which belongs to the Vice-Admiralty, and that this court has no jurisdiction over it. The action must, therefore, be dismissed (*Stuart's Rep.*, p. 341).

SALE.—DELIVERY.—LIEN.

COURT OF APPEALS, Quebec, 24 July, 1829.

On appeal from Quebec.

VAN KOUGHNET, Appellant, and MAITLAND and others, Respondents.

Advances in goods, under a written agreement, are made by A, a merchant in Upper Canada, to enable B, a contractor for lumber, to cut, and convey to the Quebec market, a quantity of timber, upon the conditions, that, as soon as dressed, it should be considered as belonging and delivered to A, but conveyed to market at the risk and expense of B ; that A, should have the sale of the timber, and account

to B, for any balance remaining, after a deduction of his disbursements and advances, including 10 per cent upon the latter, with a commission of 2½ per cent upon the sale: *Held*, that, after a delivery to A, before it reaches the market, without fraud or collusion with B, the timber could not be attached at the suit of B's creditors, in payment of his debts, but the balance if any, after a sale by A, can alone be arrested in his hands, under the process of the court. (1)

On the twenty-ninth day of May, 1827, one Alexander McDonald, being indebted to the Respondents, they obtained an attachment against his moveable effects and estate personal. Under this process, a raft of oak and pine timber, then lying at Cape Rouge, was attached by the sheriff, as belonging to the Defendant, McDonald. In the progress of the Respondent's suit to recover their debt, the Appellant intervened, and claimed the timber as his property, the same having been in his possession, until the seizure of it by the Respondents, in virtue of a delivery thereof, on the 1st day of May, 1827, and of another delivery, on the 20th day of the same month, in pursuance of a contract made at Cornwall, in Upper Canada, on the 6th day of January, 1827, between the Appellant and the Defendant, in the following terms: " The said Philip " Van Koughnet doth, hereby, agree to finish the said " Alexander McDonald with such articles of merchandize, " provisions, grain, forage and other necessaries, as he the " said Philip Van Koughnet shall deem advisable and expe- " dient, and, for such term of time as he the said Philip Van " Koughnet shall think proper, in order to enable the said " Alexander McDonald to get out lumber, and to carry the " same to market. And the said Alexander McDonald, on his " part, doth hereby agree to deliver over every stick of " lumber, or timber, that he shall prepare or cause to be " prepared for market, so soon as the same shall be dressed " for that purpose, as well as all that has already been made, " or caused to have been made by him, the said Alexander " McDonald, or has been or shall be purchased by him, to the " said Philip Van Koughnet, as agent, who shall have full " power and authority to mark the same, in his the said " Philip Van Koughnet's name, or cause the same to be so " marked, which lumber or timber shall be considered, *bonâ* " *fide*, the property of the said Philip Van Koughnet, and the " said Alexander McDonald shall not have any power or " authority to dispose of the said lumber so got out, or " purchased by him the said Alexander McDonald or any " part thereof, without the consent or permission of the said " Philip Van Koughnet, or his agent; and the lumber so got " out or purchased by the said Alexander McDonald, is to be

(1) V. art. 1472, 1493 et 1970 C. C.

" taken to market by him the said Alexander McDonald, at " his own risk and expense, and to be disposed of by the said " Philip Van Koughnet, or his agent, at the sole risk of the " said Alexander McDonald; and, after such disposal the said " Philip Van Koughnet shall retain to himself a sufficient sum " to cover all the advances made by him, the said Philip Van " Koughnet, to the said Alexander McDonald, together with " all necessary expenses that the said Philip Van Koughnet, " or his agent, shall be at, in getting the said lumber to mar- " ket, and paying off and discharging all such hands as shall " have any just claims or charges against the said Alexander " McDonald, for getting out and taking the said lumber to " market; including ten pounds, upon every hundred pounds " that shall be advanced by the said Philip Van Koughnet, in " cash, provisions, grain, and forage, with a commission of 2½ " per cent, upon the sale of the whole of the lumber; but, " should it be necessary for the said Philip Van Koughnet to " give over the said lumber to any other person, to dispose of, " then, in that case the usual commission shall be allowed " such person for disposing of the timber, the surplus, if any, " to be paid over to the said Alexander McDonald, to and for " his own use and benefit." The demand in intervention further stated, that, in furtherance of the above contract, the Appellant advanced the sum of £257 11s 4½d by means of which alone, McDonald was enabled to get out the timber in question. It also contained four other counts, alleging: 1. a delivery, in trust, upon the advances, etc.; 2. an account stated, and a delivery of the timber, in payment; 3. a right to obtain the timber *en revendication*, and 4. a *lien* for the balance due upon the advances. The Respondent pleaded the general issue only, and, by the evidence, it appeared that the timber was cut and the Appellant's mark put upon it, at Jessop's falls, on the Ottawa. The raft was given in charge by the Defendant, to one John McDonald, as his foreman and agent, and, in the river behind the Island of Montreal, the raft having been divided into two, for facility in descending the rapids, the Appellant went upon it, and the foreman delivered the timber to him, at which time, some of the pieces were marked with the Appellant's name. The Appellant, then, left the raft, which arrived safe at Quebec where he again went upon it, paid the foreman his wages, and some of the other hands. By the judgment of the Court of King's Bench, the demand in intervention was dismissed.

For the Appellant, it was contended that there was no ground for the imputation of fraud, and it could not be supposed to exist in relation to the contract. That the possession of moveables was *prima facie* evidence of property, and, it is

not necessary to prove an absolute right of property, but a special or qualified right would be sufficient. That the Appellant was a qualified owner, having provided the funds which created the property, and could not be divested of it, until his debt was satisfied. Whatever balance remained, after the sale, the Respondents were entitled to, and that was all the Appellant could be made answerable for. He was also a pawnee, and, although the principle must be admitted that the right of the pawnee existed only during possession, and was lost with the possession, the Appellant had a continued possession, through John McDonald, and the men of the raft, who had become his servants. The delivery was an actual delivery, though, from the nature of the case, only a constructive one; it was a *fictio longæ manûs*, or a delivery by pointing out. There was no other remedy than an intervention, as an action against the sheriff would not lie.

On behalf of the Respondents, it was contended, 1. That there should have been a contract, between the parties, of a nature to create the right in question. 2. That this contract should have been executed by an actual delivery of the subject matter of the lien, in pursuance of the contract, and 3. That the goods should have continued in the actual possession of the party claiming the right of lien. That all these requisites were wanting, and no right of lien, therefore, existed. By the terms of the agreement the timber in question was to remain in possession of the Defendant, until its arrival at the Quebec market, and then be delivered to the Appellant, and it was not pretented that any delivery had been then made in pursuance of it. The agreement, being in writing, could not be modified or altered by any mere parol agreement, between the parties. (1) That this agreement had not, in law, vested any right of lien in the goods in question, in favor of the Appellant, because it was unaccompanied by an actual delivery, and it was, in its very terms, executory, the timber remaining, in the intermediate time, in the possession and under the control of the debtor. (2) That the pretended delivery of the timber, behing Montreal, if made at all, was illegal and invalid (3), the same having been made to defraud the creditors of the Defendant, in a clandestine manner, whilst the Defendant was an absconding debtor, and this, to the knowledge of the Appellant, a fact established by almost all the witnesses examined. The Defendant could not come

(1) Phillips, on *ev.*, 530, ch. x, § 2, 6th ed.

(2) Poth., *Contrat de nantissement*, n°s 8, 13; Ferr. Gr. Cout., art 181, § 2; Poth., *Tr. du droit de prop.*, n° 245-7.

(3) 2 Phillips, on *ev.*, p. 92, and the case of *Astey* vs. *Emery*, there cited.

within the limits of Lower Canada, it was, therefore necessary that the timber should be sent there, in the name of a third person. Besides, the delivery, at the most, was only of certain sticks or pieces of timber, whereupon the foreman put certain marks or signs, and could only have effect as respected them, (1) and these too remained in the possession of the Defendant, through his servants and workmen, and no right of lien could have accrued, even as respected them. As respects the possession, it could amount to no more than a constructive possession, and the Appellant, as pledgee could derive no right from it, a real and actual possession being, by law, required, to maintain a right of lien similar to that set up by the Appellant. (2) If one half of the raft had been delivered to the Appellant in person, he lost his possession, such as it was, when he left it, and, thereupon, it remained in the possession of John McDonald, who was the servant and agent of the Defendant, whosesoever servant he chose to consider himself.

REID, CH. J.: The contract between the Appellant and the Defendant having been proved, as, also, that it was by means of the advances made by the Appellant that the timber was procured, the whole merits of the case rest on the facts of delivery and possession. If the delivery was a sufficient delivery, the Appellant has clearly established his right, if not, the Respondents were entitled to possession of the raft. Contracts of this nature ought to be favorably considered, as being the means of facilitating trade, and bringing a staple article to market. The advances made by the Appellant gave him an equitable claim, though not a perfect lien, and, to constitute a lien, an actual, and not a constructive possession, was requisite, although a constructive possession was sufficient, in cases of sale. The first delivery, in Upper Canada, it seems, had been abandoned, and rightly, for it was not an actual one: the other, at the back of the island of Montreal, was better established, and, in the judgment of the court, sufficiently proved by the foreman. The Appellant was personally present, and, by putting his foot on the raft, took actual possession. From that time forward, the foreman, not only considered himself in the employment of Van Koughnet, but actually received his wages from him at Quebec, as did some of the other hands. It has been objected that the raft was only to be delivered at Quebec, and that the foreman had no right to alter the agreement in that respect; but the contract cannot be so construed, for it is even expressly said the timber

(1) 2 Denizart, 300, *verbo* facteur.

(2) Arrêt of 20th June, 1770, in 2 Denizart, 300, *verbo* facteur; Paley P. and A., 117; *Kinlock* vs. *Craig*, 3 T. R., 119 and 783; Bell's Comm., 476.

was to be delivered as soon as cut and dressed; this plainly shews that an anterior delivery was provided for in the contract, and the delivery proved was, therefore, consistent with the terms of the contract, and the intention of the parties. As to only a few pieces of timber being market, that was no valid objection, the raft itself was marked, with the Appellant's name, (1) and it might as well be contended that every piece contained in a bale of dry goods should be separately marked, as that every stick of timber in a raft required it. It has also been objected that possession had been abandoned, but, when the delivery was effected, the raft came under a fresh control; and this we were not left to presume, but had the direct testimony of the foreman that it was so. The Appellant acted as owner, the foreman as his agent, the men became his servants, and he it was who paid them their wages. Again, it has been said the raft was separated, and only part delivered, but this separation was merely for temporary purposes, it was reunited and came whole to Quebec with the Appellant's mark upon it. The intention of the parties must be looked to, they were fulfilled by the whole raft coming under the Appellant's orders, as the delivery of a part of a ship's cargo, when a bargain has been made for the whole, is, in law, a delivery of the whole. (2) The court views all these objections as unfounded. The Appellant appears to have acted throughout, with good faith; he was doing no injury to the other creditors of the Defendant, but was rather promoting their interest by assisting him, and, they ought not to injure him by depriving him of his *lien*. (3) They possess all the advantage they are entitled to, in virtue of the attachment or *saisie-arrêt* under which the balance of the proceeds of the raft will come into their hands. Contracts of this kind might indeed be invalidated, if made for the purposes of fraud and collusion, but there was none such apparent in this case. The judgment of the court is, that the raft be delivered to the Appellant, with a reservation, to the Respondents, of such rights as they may possess in virtue of the *saisie-arrêt*.

Judgment reversed. (*Stuart's Rep.*, p. 357.)

(1) *Ellis* vs. *Hunt*, 3 T. R., 468.

(2) 2 H. Black, R., 504.

(3) *Hussey* vs. *Christie*, 9 East, 426; *McCombie* vs. *Davies*, 7 East, 8.

ATTACHMENT BEFORE JUDGMENT.—SCELLES.

COURT OF APPEALS, Quebec, 20th November, 1829.

On appeal from Montreal.

The hon. JOHN RICHARDSON, Appellant, and JOHN MOLSON and others, Respondents.

A writ of attachment, under the ordinance of 1787, may be set aside, 1. if it be not, in the language of that law, against the estate, debts and effects of the Defendant, to be attached in the hands of some person in particular, and does not contain a summons to him, as well as to the Defendant to appear; 2. if it be accompanied by an injunction from the judge to the sheriff to retain the effects seized to abide the judgment of the court; 3. if it appears, in the declaration, that the debt sworn to has been cancelled. (1)

It is essential to the validity of a *scellé*, under the French law, that it be executed by a judge in person, and not a ministerial officer of the court, and that the property and papers which are the object of the *scellé* remain under the seal of the court, with a guardian to protect them. (2)

An application was made, by motion, on behalf of the Appellant, to the court of King's Bench, at Montreal, to set aside a writ and process of *saisie-arrêt* and attachment, which having been rejected by that court, the present appeal was instituted from its decision. The writ in question was founded upon an affidavit in which it was stated, " that Simon McGillivray, of Montreal, merchant, then absent from the province, in his own name, as well as in his capacity of executor and residuary legatee of the late William McGillivray, deceased, and Thomas Thain, then also absent from the province, the said Simon and William McGillivray, and Thomas Thain, having theretofore traded at Montreal, as co-partners, under the firm of McGillivray, Thain & Co., were personally, and jointly and severally, indebted to the deponent, and his late copartners, in the sum of £4,000, the amount of a promissory note, bearing date at Montreal, the 10th day of January, 1825, that the said firm had since become insolvent, and was indebted in more than the sum of £200,000, the above sum included. That the said Simon McGillivray and Thomas Thain do secrete their estate, debts and effects, and the estate debts and effects of the said firm, with an intent to defraud their creditors, and, more particularly, the deponent and his late copartners. That there are, in a certain three story stone house and premises situate and being in the city of Montreal, forming the corner of St. Gabriel and St. Therese streets, boun-

(1) V. art. 834 C. P. C.

(2) V. art. 1279 et 1280 C. P. C.

ded, etc., heretofore, and still occupied as a counting room, for the business of the said firm, *divers books of account, writings, vouchers, documents, securities for money, and correspondence* of the said firm and of the said Simon McGillivray and Thomas Thain, containing evidence of debts, assets, sums of money, property and effects, in value above £150,000, belonging to the said firm, and to the said Simon McGillivray and Thomas Thain, and that there are also in the hands and possession of the hon. John Richardson of Montreal, as well in his own name and behalf, as in his capacity of curator to the said Thomas Thain, an absentee, Samuel Gerrard, George Gregory, and Peter McGill, in his capacity of curator to Simon McGillivray, also an absentee, as the deponent is informed, and verily believes, divers other *books of account, writings, vouchers, documents, securities for money and correspondence* of the said firm and of the said Simon McGillivray and Thomas Thain, comprising evidence of debts, etc., by the exhibition of which the deponent and his said co-partners might be enabled to secure payment of their debt. That divers of the said books of account, etc., since the declared insolvency of the said firm continue to be changed, altered, and cancelled, with the privity and connivance of the said Simon McGillivray and Thomas Thain, with a view to disguise the posture of the affairs of the said firm, to the prejudice of its creditors. Whereby, and, *without the benefit of process of attachment, for seizing and attaching all and every the books of account, writings, vouchers, documents, securities for money and correspondence* of the said firm, and of the said McGillivray and Thomas Thain, *as well those in the three story stone house and premises* hereinbefore described, *and elsewhere*, as those in the hands of the said John Richardson, etc., to await the order and judgment of the court, touching the same, which the deponent prayed might forthwith issue, he the deponent and his co-partners might lose his debt and sustain damage." In accordance with the prayer contained in this affidavit, an order was given, by one of the judges of the Court of King's Bench, at Montreal, for the issuing of the process of attachment, as prayed, containing an injunction to the sheriff to take into his custody *the books of account, vouchers, writings, documents, securities for money and correspondence* in question, and to detain and hold the same in his hands and custody to abide the judgment of the court. Process of attachment was consequently issued, as prayed, and the sheriff returned that he had executed it, and taken into his own charge and custody the books of account, etc. To the writ was annexed a declaration setting forth the Plaintiff's cause of action.

For the Appellant, it was contended: 1° that, by the law of this province, no writ of attachement similar to the present could issue, under any circumstances; 2° that sufficient grounds did not exist for issuing a writ, under the legal forms. There are but two kinds of attachment which could have been issued in this case prior to judgment, the first is the writ of *arrêt simple*, for the seizure of personal goods (meubles), susceptible of being sold under an execution, in the hands of the debtors, to prevent their being disposed of, and to secure them for their creditors. The second is the writ of *saisie-arrêt*, by which such things as are not liable to be sold, termed in the English law, *choses in action*, might be attached, in the hands of third persons. These two kinds of process were essentially different and distinct. In the writ before the court both were combined, and it specified nothing but things unsusceptible of attachment, they not being corporeal goods. By the provincial ordinance of 1787, (1) the only attachment that can be had against a debtor, before trial and judgment, must be against the estate, debts, and effects. No other description of things can be specified in the writ; it being matter of legal construction to determine what things are or are not comprehended in these words. The writ omits altogether the mention of "estate, debts, and effects" as being the things to be attached, and substitutes a different description of things, viz.: "Books of account, correspondence, etc. The writ, therefore, in its very frame, is illegal; and, on this ground alone, ought to have been quashed by the court below. This ordinance again, as well as the pre-existing law, authorizes an attachment to be made of such estate, debts, and effects only, as are in the possession of the Defendant, or in the hands of a third person belonging to him. The estate and effects of a Defendant, in his possession, are attached by the actual seizure of them, and, placing them in the custody of the officer by whom the attachment is made. When in the hands of third persons, they are attached by a mere injunction on them, not

(1) 27th Geo. III, ch. IV, by which it is anacted, "that no process of attachment, except in the case of the *dernier équipeur*, according to the usage of the country, shall hereafter be issued, for attaching the estate, debts, and effects of what nature soever, of any person or persons whomsoever, whether in the hands of the owner, the debtor, or of a third person, prior to trial and judgment, except there be due proof on oath (to be indorsed on the writ of of attachment) to the satisfaction of one of the judges of the court issuing the same, that the Defendant or proprietor of the said debts and effects is indebted to the Plaintiff, in a sum exceeding ten pounds, and is about to secrete the same, or doth abscond, or doth suddenly intend to depart from the province, with an intent to defraud his creditor or creditors, and that the Defendant is then indebted to the Plaintiff, and he doth verily believe that he shall lose his debt or sustain damage, without the benefit of such attachment.

to dispossess themselves of them. In this writ, there has been a most dangerous and alarming violation of the law, as now stated. It does not, as required by law, command the sheriff to attach the things to be attached, in the possession of the Defendants; but commands him to attach them, " in a certain designated building," and " elsewhere." This building is not alleged to have been in the possession of the Defendants, and we are therefore, justified in supposing it was not in their possession. (1) In commanding the sheriff, therefore, to attach the things in question, in that building, the writ has violated the law, by commanding that to be done, which the law does not permit. But the insertion of the word "elsewhere", has given a much wider extent to this extraordinary power; under this word, the sheriff has been commanded to attach the things which were to be attached, not only in this building, but in any and every dwelling-house, counting-house, shop, and place within the jurisdiction of the court, thus subjecting every merchant, shop-keeper, and householder, in the district of Montreal, to the capricious or malicious strutinizing search of a sheriff's officer, and laying open to him the inmost recesses of his house, with the disclosure of the most secret transactions of his trade, business, and family, and of his whole life; with all the humiliation and discredit incident to such a proceeding. The seizure of papers, in England, is illegal in all cases, and *Wilkes'* case excited there the strongest sensation. In that country, the power of searching for, and seizing papers, in cases similar to his, was exercised under the warrant of a high and responsible officer, one of His Majesty's secretaries of state, on a criminal charge of infrequent occurrence. Here, an indiscriminate search for papers, under civil process, has been sanctioned by the court below, a proceeding which, if sanctioned by this court, would continue in practice, from day to day, and be subversive of, and inconsistent with the security, of the persons, reputations, and property of individuals in society. These objections apply to the writ intrinsically; there are others whigh are extrinsic to it. The grounds of insufficiency in the affidavit, under the ordinance, are several: the persons who, it is sworn in the affidavit, were secreting their debt and effects, were, Simon McGillivray and Thain. But it is also sworn therein, that these two individuals were absent, that McGill was curator to the former, and Richardson to the latter. Now, as curators, Richardson and McGill were legally vested with, and had exclusively the possession of all the debts, estates, and effects belonging to the absentees in this province, at the time of making the affidavit. The absen-

(1) V. art. 553 et 841 C. P. C.

tees could not, therefore, secrete things of which they had not the possession, and over which they could exercise no power; nor could an alleged secreting of effects by them in the district of Montreal, in the nature of things impossible, warrant the attachment of debts and effects in the hands of the curators, who, it is not pretended, were secreting them, and must be supposed to have held them in a course of legal administration. The absentees, McGillivray and Thain, also, are not Defendants and their misconduct, if such there were, could not warrant an attachment against their innocent curators. The attachment of debts and effects, in the hands of their curators, could only be obtained on the ground of fraudulent conduct in the curators personally, such as is required by the ordinance. The alleged fraudulent secreting by the absentees, therefore, of estate, debts and effects, which were legally vested in their curators, and of which the latter had exclusively the possession and management, was manifestly inconsistent with reason, and could afford no ground for an attachment against the curators, the Defendants in the action. No proof such as required by the ordinance, or any other proof, was indorsed on the writ of attachment: the affidavit not being indorsed thereon. It is not stated in the affidavit that, without the benefit of an attachment for attaching the estate, debts and effects, etc., the Plaintiffs would lose their debt or sustain damage. The persons stated in the affidavit to be secreting their effects are not the Defendants in the action; so that, according to the principle upon which this attachment has been issued, the alleged fraudulent conduct of one man is made a ground for issuing an attachment against another. It is evident, from the affidavit, taken in conjonction with the declaration, that no debt, at the time the affidavit was made, was due, either by the absentees McGillivray and Thain, or by their curators, to the Plaintiffs. The debt sworn to in the affidavit is stated to be the amount of a promissory note granted by McGillivrays, Thain, & Co. to the Plaintiffs for £4000, but, in the declaration, it is expressly stated, the Plaintiffs, by the deed of assignment therein and above mentioned, *had accepted the estates, debts and property assigned to them, in common with the other creditors, in full payment and satisfaction of that debt.* While the deed of assignment, therefore, an instrument in itself merely voidable, but not void, until declared to be so by a judgment of the court, continued in force, there was no debt whatever due, either from the absentees or from their curators, to the Plaintiffs; and the affidavit, in swearing to a promissory note, which, by the Plaintiff's own declaration, had been satisfied and discharged, could not be *due proof*, or any proof at all, "to the satisfaction of a judge," that the

absentees and their curators were indebted to the Plaintiffs in a sum exceeding " ten pounds," or in any sum whatever. The order of the judge, authorizing the issuing of the attachment, was also illegal in many particulars, as, in authorizing an attachment to issue, without "due proof," as required by law; in directing the attachment to issue against certain things of persons not Defendants in the action; in directing the attachment to issue, not for attaching the estate, debts and effects, but for attaching " books of account, vouchers, writing, documents, and securities for money and correspondence," and in controling the execution of the King's writ, by laying an injunction, extrinsic to the writ itself, on the sheriff to execute it in a particular manner. If the attachment was illegal on these grounds, in what respects the Defendants, it was not less illegal in what respects the garnishees, Richardson, Gerrard and Gregory. The estate debts and effects, in the hands of the latter, had belonged to McGillivray and Thain, the insolvent debtors, but, by the deed of assignment mentioned in the declaration, they had ceased to belong to them, having been assigned to the gentlemen last named, as trustees, with the concurrence of the Plaintiffs, for their benefit, and that of the other creditors. As long as this deed continues in force, the trustees hold the assigned property in question for the benefit of the Plaintiffs and the other creditors, to whom they are accountable for the due execution of the trust confided to them. Yet, the estate, debts and effects so held by the trustess, as appers by the Plaintiff's own declaration, the Plaintiffs by their strange proceeding by attachment, choose to consider as the estate, debts and effects of McGillivray and Thain. In the proceeding against the Defendants, the Plaintiffs would appear to have overlooked the important fact that there was no debt due to them by McGillivray and Thain; and, in the proceeding against their own trustees, as garnishees, they would appear not to have been aware that they were attaching, as belonging to other persons, their own property, in the hands of their own agents specially selected and appointed.

For the Respondents, it was said, that, upon reference to the allegations contained in the declaration it would be seen that this attachment has not been made for the purpose of converting the things seized into *money*, but, as the Respondents deny that any right existed in the pretended trustees, it is for the purpose of obtaining the books of account of the bankrupts, to prove a fraud which had been practised, in relation to them, and to prevent a continuation of that fraud by falsification. The Respondents were entitled to the possession of the books, as containing the proofs, the *nomina debitorum*, by which alone the *choses in action* of the

insolvent estate could be discovered. The object of the ordinance was to repress fraud, and every thing tending to that effect is within its purview. It, therefore, includes such process of the old French law as interfered in cases of mercantile fraud. The attachment in this case was a process well known in that law, the conservatory process of the *scellé*, the only general remedy in commercial matters, for specially including books and papers, it secures to the creditors the entire property of the debtor. The ordinance not repealing the old law, but regulating it, had in contention *four species* of attachement: the *saisie et exécution*, the *saisie-arrêt*, the *saisie en revendication* and the *scellé*. The *arrêt simple*, which has been adverted to, was only a process in anticipation of execution, but the *scellé* was a general remedy, and must have been had in view by the framers of the ordinance, as well as others, and the Respondents were entitled to the benefit of the attachment which had been issued, it being in the nature of a *scellé*. The words "estate, debts and effects," which, it has been said, except as respects the *saisie-arrêt*, are confined to corporeal goods, include the french term *meubles*, which is not in many instances so restricted. It is true that, in England, *choses in action* are not liable to seizure, but, in the United States, where the words estate, debts and effects are used, personal property of all kinds, including securities, money and personal rights, are comprized. By the French law, conservatory process was very frequently resorted to, in mercantile cases, where, although other process of attachment did not extend to books, accounts and papers, the *scellé* did, and was a concurrent remedy with the *saisie et exécution*, where the latter did not suffice. It existed long anterior to the ordinance of commerce of 1673, and is recognized by it. It did not require any *procès-verbal* or guardians, or permit of security being given, but, as in this instance, secured the things seized, without any inventory, to abide the order of the court. This remedy is borrowed from the Roman law, whereby the *bona* of an absconding debtor could be attached for the benefit of the creditors generally, and, by the term *bona*, was understood not merely corporeal, but the whole of the estate, corporeal and incorporeal, or estate, debts and effects. Upon the whole, the *scellé* must be the very process contemplated by the ordinance; in proof of its being so, it is to be observed, that an allegation of secreting the effects is required, whilst other *saisies* require only an affirmation of the debt. In cases of insolvency the first steps to be taken by the creditors, is to obtain the books to obviate fraud, falsification and embezzlement. This is done by the *scellé*, and it is stated, by different writers, that, by it,

effects may be got at which cannot be taken in execution. Its principal object is a distribution *pro rata*. The words estate, debts and effects, are used in the English bankrupt law, within which are comprised books and accounts. The proceeding, in England, in a case of this kind, would have been under a commission of bankruptcy; in Scotland, by means of a sequestration, and in France, by the *scellé*. In all of which, the main point is to secure the books of account. It has been argued that the things seized were not in possession of the debtors, but of third persons, we deny that any right was vested in the trustees; the property was in the bankrupts, and in a building where they carried on their business. It is competent to the Respondents to shew that the deed of assignment was founded on fraud, and a nullity, not voidable but void, it is so on the face of it, having been made by Simon McGillivray, who was not competent to make it, and from the fact of his not having put the creditors in possession of all the effects of the firm. Besides, Thomas Thain was no party to the assignment, and he cannot stand acquitted, Richardson stands here as his curator. On this, and minor objections, as, 1° the affidavit not being indorsed on the writ, it is to be observed that it is annexed as a schedule, 2° the debt being not due, this is answered by stating that an affidavit of debt is sufficient, 3° that the garnishees are improperly brought in as being trustees, and in legal possession. We deny that they are trustees, and they are not mentioned as such in any of the proceedings. As to the place where property may be attached, *Pothier* says it may be taken wherever it can be found, *soit en ville, en campagne, dans les champs, en chemin*, and unless the property were shewn to be in the garnishees, the sheriff stands justified in what he has done, the premises were in the bankrupts possession, and were not transferred by the assignment to the pretended trustees, and whatever rights the latter might possess, could not interfere with those of the creditors. If the trustees should be guilty of malversation, falsification or embezzlement, the creditors have their redress by a *saisie en revendication*. It has been said that it was impossible for McGillivray and Thain to be personnally secreting their effects in this province, it was possible, however, for them to have done so by instructions to and through third persons, *qui facit per alium facit per se*. The object of obtaining the correspondence and papers, is to show that, under the control of McGillivray, funds belonging to the creditors, had been misapplied, concealed and embezzled. No blame or malversation is ascribed to the curators, as curators, but they are made parties, as the legal representatives of those to whom such

conduct has been attributed. If the books and papers are returned, the fraud and falsification complained of will be proceeded in.

In reply, it was contended that the attachment could be considered only as an *arrêt simple*. That it was an error to suppose the *scellé* an attachment, and thence contemplated by the ordinance. Some of the effects of an attachment may arise from the *scellé*, but no writer has included it in the term of *saisie*. It is quite a different process. The *saisie* is an open and public process emanating from a court; the *scellé*, one of an arbitrary and secret nature, derived from a judge alone, and often used in France in a high handed and oppressive manner. And there gave rise to many complaints. The *saisie* secures property, for payment of a particular debt, whilst the *scellé* is resorted to for the benefit of all concerned, heirs, widows, orphans, executors and creditors. It can be resorted to by creditors, during the life of the debtor, in case of bankruptcy or absence; but, as a civil remedy, it can only be on a *titre exécutoire*, a judgment debt. It is only on proof of fraud, on the part of the debtor, that it can be had previous to judgment, which brings it under the head of criminal law. It can only be a part of the law of this country, so far as it is a civil remedy, the instant it becomes a criminal process, it is not, a distinction which has not been adverted to. In this case, there is no judgment debt; as a civil remedy, therefore, it does not apply, and, as a criminal prooceeding, the law of the land will not allow it. *Pothier*, in his *Procédure civile*, marks the difference between attachments (*saisies*) and the *scellé*. The *saisie* is executed by a *huissier*, and the *scellé* by a judge or *commissaire*. The forms are essentially different. The *saisie* secures certain effects for the satisfaction of a debt, the *scellé* is to prevent an entire estate from being left *à l'abandon*, and to secure it for all concerned. The *scellé* takes place when the debtor is dead or absent, the *saisie*, when he is alive and present. In fact, the *scellé* was not thought of, when the process in question was issued, and was not mentioned as a process of attachment. The words "let process of attachment issue" were in the writ which the sheriff was directed to execute. The judge who granded the writ must have known that a *scellé* could not be executed by a sheriff, and, if he had intended it for a *scellé*, he would have attended in person to affix the seals. Had this writ been in proper form, the sheriff would have found that he had no right to pass the threshhold of a building in possession of third persons, without rendering himself liable to an action of damages. It was a happy circumstance that, in this violent and illegal proceeding, no blood had been shed.

If the sheriff's officer had been resisted and killed, in the execution of this process, it would have been justifiable homicide, or, under some circumstances, have amounted to manslaughter, but not murder. If, on the contrary, life had been taken by the sheriff, or his officer, it would have been murder. It is remarkable that the mass of creditors had confided in men of known honor and respectability, and, but one, out of the whole, came forward to wrest the books and accounts from their possession.

SEWELL, CH. J. : The merits being wholly out of the question, the case rests entirely upon the writ of attachment, and the circumstances under which it was issued. It is the ordinance of 1787, and the French laws which existed at the conquest, and were secured by the capitulation, that must govern the question. If the proceedings were found consistent with either, the motion must be quashed ; if with neither, it must be maintained. As to the ordinance of 1787, the proceedings were in several points at variance with that law. The writ of attachment did not follow the words of the statute: it should have been against estate, debts and effects, and have left to the Plaintiff, at his own risk, to direct the sheriff what to take and then to the court to determine, whether the things taken were within the scope of the law. The writ should further have directed the property to be seized in the hands of some particular person, the property must be in possession of somebody, either of the debtor or of third persons, and, if in the hands of third persons, not only must those third persons be summoned, but the debtor must be served with the writ and declaration that he likewise may appear. In this case, the judge has given a writ of attachment to seize certain things in a certain building, or elsewhere, without specifying in whose possession it is to be seized ; and goes still further, adding an injunction to the sheriff to retain the things seized, in his custody, to abide the decision of the court: all which is in direct opposition to the letter of the ordinance, and to the provision of the law, by which the party seized upon is entitled to have his things restored upon giving security. The writ of attachment is, therefore, clearly illegal, under the ordinance of 1787. As to the old French law, on which the respondents profess to have founded their proceedings, it appears that, in case of bankruptcy, the property, was to by secured, not by an *arrêt simple* or any other *arrêt*, but by the *scellé*, which did not dispossess the party of his property and papers, but placed them, in such a situation that no one could touch or inspect them, until the time arrived when the court should determine whether they were to be given up to the creditor, or returned to the debtor. This was done by the

sealing up of the receptacles, chambers, and places, in which the property was, and was done by the judge in person, or by a commissaire (a kind of deputy-judge, to whom we have no counterpart in our jurisprudence), so that it could not be done by any ministerial officer; and, in addition, a guardian was placed to see that the seals were not broken, and the property and papers not touched. Now, the practice resorted to in this case has been singularly different, supposing this proceeding, as is alleged, to be in the nature of a *scellé*. The judge delegates a power to the sheriff, which, under that law, he could only exercise in person; and the property, in lieu of remaining safe, under the seals of the court, is left in the hands of a ministerial officer. So that, whether it be considered as a process, under the ordinance of 1787, or under the French law, as it existed before the conquest, the issuing of the attachment, as it stands, cannot be maintained. To refrain from remarking on minor circumstances, the fatal objections to the mode of proceeding followed, are: 1. Instead of a special writ, a general one has been issued, without discriminating any person, as in possession; and without summoning any person as Defendant, and without using the words of the law as to what was to be seized under it. 2. The injunction to the sheriff, to hold the things in his custody is directly contrary to the ordinance and the provision that, upon security being given, they must be restored. 3. If these proceedings were to be founded on the law existing before the conquest, the forms of proceeding by the *scellé*, under that law, should have been observed, so that the property might remain under the seal of the court, thus avoiding the irregularity which now destroys them. 4. That, on the face of the declaration, there appears to be a deed of assignment, whereby, as long as it remains in force, which must be till it is rescinded by the court, the debt sworn to is cancelled.

KERR, J.: The writ of attachment in this case is certainly an anomaly, and pursued neither the one form nor the other. It has been a question whether books of account and papers come under the description of estate, debts and effects. Books certainly are evidence on which claims are founded, but they possess no intrinsic value, and the true test of their not coming within the meaning of the words estate and effects, is, that they cannot be sold under execution or seized previous to judgment (1); neither are they debts although they constitute the proof of debts. They thus are exempted from seizure by the ordinance, which is perfectly precise and conclusive in its enactments. In England, a Defendant cannot

(1) V. art. 557 C. P. C.

be compelled to produce his books. A court of equity might, under very strong circumstances, compel the production of books and accounts, but a court of law could not, and we have no court of equity in Canada. The writ is perfectly illegal, and the opinion of this court is that the judgment of the court below must be reversed, with costs. (1) *(Stuart's Rep.*, p. 376.)

13th January, 1830.

Held : That if a motion to set aside an attachment, by the sheriff, of books of account and papers, be rejected in a court of original jurisdiction, and its judgment to that effect reversed in appeal, the Court of Appeals will not grant a rule for an attachment against a judge, for putting a *scellé* upon such books and paper, before they are restored by the sheriff to the person in whose possession they were seized, against the sheriff for delivering them to the judge for that purpose, or against the party and his attorney, at whose instance the *scellé* was carried into execution.

(1) The above judgment was rendered on the 20th day of November, 1829. McKenzie, a creditor of the firm of McGillivrays, Thain & Co., who had obtained a judgment, in the Court of King's Bench, at Montreal against the legal representatives of that firm, presented a petition bearing date the 21st November, to one of the judges of that court, praying, for the reasons therein contained, that seals *(le scellé)* might be put and affixed upon certain books of account, papers, muniments, vouchers and effects, which were the same as those mentioned in the writ of attachment in the above case. On the 24th of November, the truth of the facts stated in the petition were substantiated by affidavit, and on the same day the hon. Norman Fitzgerald Uniacke, one of the justices of the Court of King's Bench, proceeded to the building described in the writ of attachnment, and affixed the seals of the court upon the premises, and named guardians to preserve the seals. On the 25th of November, a service of the above judgment of the Court of Appeals was made upon the sheriff of the district of Montreal, at the instance of the Appellant, and a demand made upon him to discharge the attachment and deliver up the keys of the building in St. Gabriel street, to which he replied that he had already seen the judgment, that the adversaries of the Appellants had got the start of them, and that the deputy sheriff had delivered over the keys of the building to Mr. Uniacke. Upon these facts, substantiated by affidavit, and certified copies of the documents above mentioned, an application was made to the Court of Appeals for a rule, to shew cause why an attachment should not issue against the judge who executed the *scellé*, for having, by means of an usurped jurisdiction, and by colour of a judicial proceeding, obstructed the judgment of the court, bearing date the 20th day of November then last, and assisted in preventing the restitution of the books of account, etc., according to the purport of the said judgment, etc. An application to the same effect was made for a rule upon McKenzie, his attorney, and the sheriff of the district of Montreal. The Appellant having been heard by his counsel.

Per Curiam : We are of opinion that no attachment can issue. In the first place, this court gave no direction to the sheriff to deliver up the property, but merely reversed the judgment and sent it back to the court below, to do what to law and justice might appertain. It did not appear that any thing further had been done in the court below, but a new party, another creditor, had come forward and instituted another proceeding. The former was by *saisie-arrêt*, the present one by *scellé* ; this last, a judge sitting out of court, is obliged upon application, to grant and execute. The whole proceeding may be illegal and contrary to law, but it has nothing to do with the former case, and the motion must be discharged.

WILL.—SEIZINE OF LEGATEE.—PROCEDURE.

COURT OF APPEALS, Quebec, 30th April, 1830.

On appeal from Montreal.

DENIS BENJAMIN VIGER et ux., Appellants, and TOUSSAINT POTHIER, Respondent.

A testator, at the time of his decease, possessed of property belonging to the succession of his wife, deceased, by an holograph will, bequeaths all the property of which he might die seized to his heirs and legatees, who were also his wife's heirs, under the penalty, if any of them contested his will, that their share in his succession should be forfeited. He names two executors or trustees, and the survivor of them, for the administration of all his property, until a partition. In the making of such partition, he directs his executors to act for some of the legatees who were minors, and for another who was married, without the authority of her husland, for that purpose, being requisite, and whose share they should administer, during the husband's life, paying her the rents, etc. : *Held*, that the will is valid, but that its dispositions can be carried into effect only so far as they affect the succession of the testator, and that they could not in any manner apply to the succession of the testator's wife of which his legatees were the heirs, and of which they were, in law, seized from the day of her death, and that one of the executors having renounced the execution of the will, the other had saisine of the testator's succession to carry his will into effect.

To an action, against several heirs, it is not a valid objection that all of them were not originally made Defendants, if, in the progress of the suit, they have been made parties, by an interlocutory judgment of the court. (1)

In the year 1764, Pierre Foretier was married to Thérèse Legrand, who died in 1784, leaving several daughters, issue of their marriage. Her succession was composed of her share in the matrimonial community, and of estates of the nature of *propres*. In 1785, Foretier made an inventory of her succession, and retained possession of the same, with the rents, issues and profits, until the day of his decease, on the 3rd day of December, 1815. By his last will and testament holograph, bearing date the 20th October, 1814, after making several specific legacies, he bequeathed the surplus of all his property to his children and grand children, whom he instituted his heirs and universal legatees, to be distributed among them, in conformity with the law of succession : he declared "that Marie Léocadie Foucher should have one share, Therese Heney and Hugh Heney, one share, Marie Marguerite Foretier and Marie Amable Foretier, wife of Denis Benjamin Viger, each one share, or their children, by representation, if they died before him. In a codicil, bearing date the 6th day of

(1) V. art. 120 C. P. C.

August, 1815, the testator declares it to be his intention, that, if any of his children or grand children should, in any manner, contest his will, under any pretext whatsoever, that they should be altogether deprived of any share in his succession; in such case, formally disinheriting them, and giving their share to his other children and grand children. For the purpose of carrying this will into effect, he named Toussaint Pothier and Hugh Heney his executors, divesting himself, in their favor, of all his estate, authorizing them to administer the same, until a partition should be made among the heirs. He directed the executors, or the survivor of them, to sell, as they might see fit, such immoveable estate as might be necessary to effect a partition, and in such partition he authorized the said two executors, or the survivor of them, to stipulate, act for, and represent such of his said legatees who were minors, as well as Marie Amable Foretier, wife of Denis Benjamin Viger, without its being requisite, for the validity of such partition, that a tutor to the said minors should be elected, or that the said Marie Amable Foretier should be authorized by Denis Benjamin Viger, her husband, or by judicial authority. After partition made, he directed that his executors, or the survivor of them, should have the administration, and receive the revenues of the minors, until their marriage, or until they were of age, etc., also that the executors, or the survivor of them, should have the management and administration of the property, and the exclusive collection of the revenue of the share which, upon the partition, would fall to Marie Amable Foretier, and this, during the life of Denis Benjamin Viger, and, if she survived him, she should have, at his decease, the free administration and property of and in the estate which would fall to her from this will. During the administration by the executors, the amount of revenues, etc., were to be paid to the said Amable Foretier, to herself and to no other, quarterly, and upon her receipt merely. The executors were also entrusted with the care of the estate of Marie Julie Foretier, during her life, or until her marriage." After the testator's death, on the 20th December, 1815, by an instrument executed before Guy and another, public notaries, the heirs acknowledged the will to be of the testator's hand writing, and the signature affixed to it to be his, with a reservation of their rights, and without admitting the validity of the will. Heney having renounced the execution of the will, an action was instituted by Pothier, the Respondent, as executor, and, in virtue of the trust, or *fidei commissum*, with which he was charged, against the heirs who had taken possession of all the testator's property. The conclusions of the declaration were, " for a *scellé*, that the will and codicils should be esta-

blished, and the execution thereof ordered, that, if the legatees should contest the will, their interest under it might be declared forfeited. That, as executor and trustee, the Plaintiff should, by the judgment of the court, be and remain seized of the estates of the testator, in conformity with the will. That the Defendants be adjudged to deliver to the Plaintiff all the moveables, written securities, etc., with an injunction on them not to molest the Plaintiff in the execution of the will. That an inventory be made, and that the Defendants do pay to the Plaintiffs £5000. damages." In the progress of the suit, the *scellé* was set aside. An inventory was made by the heirs, of all the property left by Foretier, and the moveable property sold. The Appellant pleaded by exception, "that Hugh Heney should have joined the Plaintiff, in bringing this action. That it was not sufficiently alleged, in the declaration, that Hugh Heney had renounced the execution of the will, and the trust thereby reposed in him. The non joinder of Marie Thérèse Heney, as a co-defendant, was alleged; also that the acknowledgment of the will, mentioned in the declaration as having been made by the heirs, and the deposit of it before a notary, were illegal. That the Plaintiff had no *saisine*, under the will, that, in the estates of which the testator died seized, was comprized the succession of Thérèse Legrand, to which the Defendants were heirs, and, therefore, the trustee had no claim to it. That the Plaintiff could claim only so much of the estate as would suffice to pay the legacies. That an inventory had been made by the Defendants who were legally in possession, that the Defendants had paid all the legacies, except one which was illegal. That, if the Plaintiff had any right of action, he had mistaken the kind of action it was competent to him to institute. That there was no ground for a demand of damages, that the disinheriting of the Defendants could not be demanded by the Plaintiff, the clause in the will on which it was founded being null, and that the conclusions of the declaration were irregular." Issue upon the pleadings having been joined, the parties were heard on the merits, on the 11th April, 1822, and, on the 20th February, 1824, an interlocutory judgment was pronounced, ordering that Etienne Mayrand and Marie Thérèse Heney, his wife, should be made parties to the action. They accordingly intervened, and prayed that final judgment might be rendered in the cause, in the state it then was. On the 9th of June, 1824, another interlocutory judgment was pronounced, by which the court ordered "that, by parties conversant with legal proceedings (*praticiens*), an account of the conjugal community, between the testator and Thérèse Legrand, should be made, exhibiting the rights of the parties in that commu-

nity." *Praticiens* were named, but no steps were taken to carry the interlocutor into effect: on the 20th April, 1826, a motion was made, on the part of Mayrand and wife, and Durocher and wife, to set aside this interlocutory judgment, and, on the 2nd of June following, a motion to the same effect was made by the Respondents. The reasons assigned in the latter motion were: 1. That the execution of the will, which was admitted by the Defendants, ought to be provisionally ordered by the court, whereas the interlocutor had the effect of retarding it. 2. Because all the estates left by the testator are considered in law to be part of his succession, and the Respondent, as executor, was legally seized of those estates. 3. Because the Defendants, being heirs of the testator and of Thérèse Legrand, a confusion of rights had been operated in their persons, precluding them from exercising rights against themselves for their shares in the two successions, and because no partition, as contemplated by the interlocutor, could be had, but a partition only in conformity with the will. 4. Because the succession of Thérèse Legrand being, by the will, united with the testator's, no partition, as ordered by the interlocutor, could be made. The parties having been heard on these motions, the court, by a judgment of the 20th February, 1827, wherein its reasons were assigned for so doing, set aside the interlocutor, declaring that the paternal and maternal successions, of which the Defendants were the heirs, had become but one and the same, that the will and codicils should be executed, according to their form and tenor, and that the Respondent, as sole executor and administrator, should be seized of all the estate left by Foretier, at his death, to administer and regulate the same, according to the will of the testator. From this judgment, this appeal was instituted.

KERR, J.: The first question presented to us is whether proof of the testator's will has been offered? I am of opinion, that, as all the parties attended at a notary's office, and formally admitted the instrument there deposited, to be the holograph will of Foretier, they are now estopped from denying that it is the testamentary devise of that gentleman. (1) Admissions of matters of fact by parties concerned, who are most likely to know, it is said by lord *Hardwicke* (2) are stronger than if the facts had been determined by a jury. Being thus admitted, the next question follows, what is the rule of construction as applicable to all wills? Numerous authorities from French authors shews that the intention of the testator alone, governs the construction of his will, and,

(1) V. art. 857 et 859 C. C.

(2) 1 Atkyns, 629.

indeed, it would be a solecism in language to call it the testator's will, if it were not construed according to his intention. The English law, in perfect accordance with these authorities, furnishes many didactical rules of construction strongly applicable to the case. A late writer says, "there is only one general rule of construction for courts of law and equity applicable to all wills, however the court may condemn the object, the intention is to be collected from the whole will, every word is to have effect according to the natural common import." The court is bound to carry the will into effect, if consistent with the rules of law, and, if it can see a general intention, consistent with the rules of law, but the particular mode is not, though that shall fail, the general intention shall have effect." (1) "There is no certain rule in cases arising in the construction of a will, they must be alone construed according to the particular words, the circumstances, or views of the testator." "For the purposes of collecting the intention, every part of the will must be considered." (2) But the precepts particularly applicable to this case are, "a will is not to be construed by something *dehors*, as by the state of property, where there is no latent ambiguity, (3). Again, "If the testator might not have contemplated the event, that will not affect the construction," (4) "inconvenience attending the carrying into effect a particular disposition by will, is not a sufficient reason for controling its obvious construction." (5) Few wills can be conceived in clearer or less ambiguous words than the will of the testator Foretier. This will has not been carried into effect, but its execution opposed for these fifteen years, and his designs frustrated by the very persons who were objects of his bounty. The Appellants have urged, as an excuse, for their having taken possession of all the testator's real and personal estate, his having devised the succession of his wife, in which they had a share. If this argument could avail any thing, it could only be so far as respects that portion of the estate over which he had no control, and not render nugatory the devise of the remainder which belonged to himself, and affords no reason why that devise should not be carried into complete effect. The Appellants appear to be under an error, in supposing that a confirmation of the judgment of the court below will divest them of their claim to a share in the succession of Thérèse Legrand. It is true that it

(1) 4 Ves., 329 ; Com. Dig., vol. VIII, Appx., 409.

(2) 1 *Ball* and *Beat*, 409, 460.

(3) 3 Mer., 316, 409.

(4) 7 Ves., 369.

(5) 1 Mer., 417.

declares the will and codicil must be executed, according to their form and tenor, that is, that the whole property of which the testator died seized, including Thérèse Legrand's (which he had quietly possessed for 30 years, and might have presumed to belong to himself), should pass to his fiduciary legatee, subject to such claims as legally attached to it in his life time. Of course, the judgment does not place the Appellants in a position less favorable than they held, when the testator was alive. But, even if the Appellants had surrendered their interest in the succession of Thérèse Legrand, they would have shewn more respect to the testator's memory, and facilitated the execution of his will; and, as they have obtained forcible possession of both estates, I am of opinion, that they have submitted no solid ground of objection to the demand of the executor, in his character of fiduciary legatee, and that he ought to be put into possesion of all the property of which Foretier died seized.

Many objections have been taken to the proceedings in this action, as that Mayrand and wife were not originally parties. They were called in afterwards, and took part in the proceedings, and here the maxim *consensus tollit errorem*, emphatically applies. Another objection is that the court below pronounced an interlocutor, which was rescinded by the final judgment, but the rule applicable to interlocutory judgments of this description is stated by *Voet, quæ et postea per supervenientem definitivam retractari potest, in quo à definitiva differt.* It has been also objected, plausibly enough, that we must look to the conclusions of the declaration, where we will find that more has been granted by the court below, than is demanded by them: that, as the Plaintiff has not asked to be put into possession, but that the court should declare him *saisi*, they had decided *ultra petita*, and actually granted to him *saisine* of the estates, which he had not before. If the statutes 14th and 41st of His late Majesty, had not operated a complete change in the law, so far as respects testamentary dispositions, there might be some force in this objection, but these acts giving to all his Majesty's subjects a right to dispose of their property, real and personal, by last will and testament, it is no longer a question how far *l'institution d'héritier* is not competent to every one who has property; the state of things is no longer the same as before these acts, and it is wisely said that as law is a just rule fitted to the existing state of things, it must alter, as the state of things to which it relates alters. "On appelle," says the *Répertoire de jurisprudence*, "institution d'héritier, la nomination ou désignation de celui qui doit succéder à tous les droits actifs et passifs d'un défunt." And further "une

hérédité se défère de deux manières, par la volonté de l'homme ou la disposition de la loi." If the institution of an heir, by last will and testament, in this province, mean any thing, it must import that, as soon as the testator dies, his estates passes by the *hæres natus*, and vests in the *hæres factus*, on whom he has conferred it. (1) Were it otherwise, it would be a departure from the prescribed rule, *semper vestigia voluntatis sequimur testatorum*, and be a violation of all consistency and commom sense, for it would make the law declare that it upheld the testator's intention of giving his estate to his *hæres factus*, when it actually vested it in the *hæres natus*, or in other words, that, though Foretier's intention to give his estate to the Respondent, his fiduciary legatee, was manifest, for the purposes of his will, the law declared it to be actually vested in the Appellants, from whom the Respondent could only hope to divest it, after a struggle of many years. Nor is this view of the law as applicable to this case, without indirect authority, as well as supported by the inference necessarily to be drawn from the principle that the intention of the testator is to be the guide in construing a will, for *Bourjon* says: " L'institution d'héritier n'ayant pas lieu par testament, tout legs soit universel, soit particulier, est sujet à délivrance," and, further on, "en effet, par la mort du testateur, tous ses biens, pour ainsi dire, volent dans la main de son héritier. C'est ce que la coutume exprime fortement par ces mots, *le mort saisit le vif.* (2) By the words, *l'institution d'héritier n'ayant pas lieu par testament*, he plainly indicates that the doctrine of *délivrance de legs*, either to the instituted heir, or the universal legatee, is a creature of the law, as it existed before a power was given to all men to bequeath their estates by will, from which we must necessarily deduce this conclusion, that the instituted heir or universal legatee, under the altered and new system, being substituted *loco hæredis nati*, the maxim *le mort saisit le vif* disappears, and the testator's estate, at the instant of his death, becomes virtually transferred to the universal legatee, subject to all the claims and incumbrances to which it was liable during his life. I am supported in this opinion by the *Napoléon Code*, which has been dictated by a new and enlightened policy. The 1006th rule of the chapter on wills is in these words, " lorsqu'au décès du testateur il n'y aura pas d'héritier auquel une quotité des biens soit réservée par la loi, le légataire universel sera saisi de plein droit, par la mort du testateur, sans être tenu de demander la déli-

(1) V. art. 891 C. C.

(2) 2 Bourjon, 329.

vrance." (1) Although the Respondent, owing to the opposition he has met with, has not, as fiduciary legatee, obtained actual and available possession of the testator's estate, he had, in a legal construction, possession of all the property of which he was seized at his death, so that the court below, in awarding the conclusion *être declaré saisi*, have not, in my opinion, proceeded beyond the demand in the conclusions of the Respondent. I should add that the reasons contained in the judgment of the court below, have had no weight on my mind: it is the decretal part alone of which I approve, and that, I am of opinion, ought to be confirmed, leaving it open to the Appellants, when the Respondent shall have obtained actual possession of the entire estate, to take such course as they may be advised to divest the fiduciary legatee of the succession of Thérèse Legrand. Thus carrying into effect the will of the testator, so far as the law will permit, and, at the same time, protecting the Appellants from any prejudice to the recovery of their just rights.

STEWART, executive councillor, concurred in the foregoing opinion.

SEWELL, CH. J.: In this case, we have to pronounce upon the legality and the effect in law, of the will of the late Pierre Foretier, upon the respective claims and pretensions of his heirs, the Appellants, and of his executor the Respondent. It is to be observed that, in the course of this long protracted suit, the *scellé* has been removed, that an inventory of the property possessed by the testator, at his decease, has been made and his moveables sold, proceedings in which the Respondent has acquiesced, and that, so much of the judgment of the court below as rejected the conclusions for a forfeiture of the Appellant's share in the testator's estate, and for damages, is unimpeached. The only points now in discussion, are: 1° the validity and legal effect of the will; 2° the extent of the executor's *saisine*. For whether the heirs are bound to restore to the executor the moveable property, if any they have, belonging to the estate of the testator, whether they be enjoined not to sell them, or receive any debts due to the testator's estate, and not to molest the Respondent in the execution of the will, are questions entirely depending on these two points. The validity of the will depends upon its form, and its context, in its form it is an holograph will which the law sanctions, and it is formally admitted by all parties to have been entirely written and signed by the testator. As to its context, it has been urged that

(1) V. *The Royal Institution for the advancement of learning* vs. *Desrivières*, ante, p. 220.

the will is entirely null and void, but no sufficient reason has been assigned to shew that it is so. Foretier had an undoubted right to dispose of his own property, and also to disinherit his heirs, if he saw fit, in the first instance; and, consequently, he had a right to disinherit them, upon a contingent event, which was to depend upon themselves, we cannot, therefore, say that the will is entirely null. (1) But we are, nevertheless, of opinion that the testator could not bequeath or transfer any other than the property which was vested in himself on the day of his decease, and that the provisions of the will cannot, in any manner, affect any property then in his possession, which was vested in the heirs of Thérèse Legrand, (2) and this was the case, not only as to all the property which were *propres* in her succession, but, also, as to that part of it which formed her share in the conjugal community existing between her and the testator. In both these instances, the possession of the testator was merely *de facto*. The "*possession civile*" was in the heirs of Thérèse Legrand, and from the moment of her decease all her property was vested in her heirs, "le mort saisit le vif," and therefore, as the testator could not dispose of their property by will, he unquestionably could not affect it by any of the conditions which he endeavoured to impose upon it. Then, as respects the second point, "whether the Respondent, is, or is not entitled to the saisine and possession of all the property of which Foretier was possessed on the day of his decease." (3) And, here, we must observe that the power of the executor over property bequeathed, cannot exceed the power of the testator over the same property. If, then, Foretier had no power to transfer the property of Thérèse Legrand, he could have no power to vest it in his executor, in trust, for the purposes of his will, nor do the words of the will in fact, shew that such was his intention, on the contrary, they prove that it was his intention, to vest in his executor his own estate and succession, his words are "I name Toussaint Pothier, esquire, and Hugh Heney, my grand-son, into whose possession, I divest myself of all my property, authorizing the said executors to administer *the said property*, until a partition shall be made among my heirs." We are, therefore, of opinion that, under the will, the Respondent is entitled only to the saisine and possession of the property which constitutes, exclusively, the succession of Foretier, that is, of that portion

(1) V. art. 831 C. C.

(2) V. art. 1293 C. C.

(3) V. art. 919 C. C.

of the property in his possession on the day of his decease, and which will remain, after subtracting therefrom the *propres* of Thérèse Legrand, and her moiety of the conjugal community; and, after deducting from the other moiety of the same community, belonging to the testator, so much as may be due to her heirs for any alienations of property which he may have made, for the rents, issues and profits of *her propres*, and of her share in the community which he may have received. To return to the matters above stated to be dependant upon the decision of these questions. It follows, of course, that the heirs are bound to restore to the executor the property, if they have any in their hands which may be found to belong to the estate and succession of Pierre Foretier, when established in the manner above mentioned; that they cannot sell any property of this description: that they cannot receive any debt due, exclusively, to the succession of Pierre Foretier, (1) and that they cannot be permitted to molest the executor in the lawful execution of the will, as to the succession of Foretier.

This court has not failed to give the attention due to the reasons assigned by the court below in support of their judgment, " That the said Defendants were heirs of the said Pierre Foretier, and that, in virtue of the will, codicil and testamentary dispositions of the said Pierre Foretier, and according to the disposition of the same, the said Defendants have intermeddled with the succession of the said Pierre Foretier, and have acted as heirs, under the will, the only quality they could assume, and have thereby bound and obliged themselves to accomplish and fulfil, without deviation, all the charges and conditions imposed by the said will, codicil and testamentary dispositions, and could no longer legally contest the same. That, in accepting the said succession by will of the said Pierre Foretier, the two successions, paternal and maternal, to which the said Defendants are heirs, have been blended together, and form but one and the same succession. " But, after a diligent examination of the record, we do not find any evidence by which they would be warranted in drawing these conclusions; on the contrary, we find that the heirs have uniformly denied the validity of the will, except as to its form, admitting the handwriting and the signature, but no more, and that they have intermeddled, not as Foretier's legatees, but as the heirs of Thérèse Legrand. This appears particularly from the instrument of the 20th December, 1815, wherein the heirs reserve " their rights, as heirs respectively, and without its being considered in any

(1) V. art. 919 C. C.

manner to prejudice them, and without, on their part, admitting the validity of the said will, codicil, and dispositions by will, or the validity of any of the clauses or dispositions therein contained," and from the answer of the heirs to the notarial summons. on the 23rd of January, 1823, by which they were required by the Respondent to proceed with him, as executor, to make an inventory of all the property possessed by Foretier at his decease; in this answer, they refer to the above instrument and state, "that, being seized, as well in fact as in law, of the property left by the said Pierre Foretier, composed, as they have already informed the said sieur Pothier, of different successions, they have, of themselves, already commenced an inventory which is in progress, and, consequently, they oppose such inventory being proceeded in by the said sieur Pothier."

For these several reasons, the judgment of this court is, that, so much of the judgment of the court below as declares that the Appellants, in virtue of the will, codicil, etc, as already stated, and their order in consequence, that the said holograph will of the said Pierre Foretier should be executed, according to its form and tenor, and that the Respondent should be seized of all the property left by the said Pierre Foretier, as sole executor of the said will, and as administrator, to manage the same, until the entire accomplishment of the intentions of the said Pierre Foretier, and, also, so much of the said judgment as declares the Appellants accountable to the Respondent for all the estates, moveable effects, etc., possessed by the said Pierre Foretier, at the time of his death, according to an inventory, etc., mentioned in the said judgment, and, also, so much of the same judgment as dismisses all the exceptions fyled by the Appellants, and condemns them to pay costs, be and the same is hereby reversed, and declared to be of no effect, with costs to the Appellant, in this court, and in the court below, against the Respondent, in his quality of executor, and, by this court, it is adjudged that the said holograph will and codicils are good and valid, so far as they relate to the estate and succession of the said Pierre Foretier only, and that the said will and codicil are null and void, so far as they relate to the succession of Thérèse Legrand, and, accordingly, it is ordered that the said holograph will and testamentary dispositions be carried into effect, so far as they relate to the succession of the said Pierre Foretier exclusively, and, by this court, it is further adjudged that the Respondent, as sole executor of the said will and testamentary dispositions, is entitled to the saisine of the estate and succession of the said Pierre Foretier, and that he is not entitled to the saisine of the estate and succession of Thérèse Legrand, or of

any property not exclusively part and portion of the estate and succession of the said Pierre Foretier, and that the Appellants do deliver unto the Respondent, as executor, all the moveables, titles, etc., belonging to his estate and succession, in their possession, hereby enjoining the said Appellants not to trouble or molest the respondent, in the lawful administration of the estate and succession of the said Pierre Foretier, according to the tenor of this judgment, and, it is lastly adjudged, by this court, that the conclusions of the Respondent's declaration praying that such of the heirs of the said Pierre Foretier, as should contest the said will, be declared to have forfeited their share, under the said will, and for £5000 damages, be dismissed. And that, so much of the exceptions of the Appellants, as pray that the action of the Respondent be dismissed, because Thérèse Heney and her husband were not originally made parties to the suit, and because it was not sufficiently alleged in the declaration that Hugh Heney had renounced the execution of the will, be and the same is hereby dismissed. (*Stuart's Rep.*, p. 394.)

SALE.—DELIVERY.—LIEN FOR MONEY ADVANCED.

PRIVY COUNCIL of HIS MAJESTY, 10th and 14th July, 1830.

JAMES ROGERSON and others, Appellants, and ISAAC CORRIE REID, Respondent.

A mercantile house, at Newry, directs a house at Quebec, to contract for the building of a ship, for which they, the Newry house, would send out the rigging. The Quebec house enter into a contract, with some shipbuilders accordingly. The Newry house then direct their correspondent at Liverpool to sent out the rigging; he does so: and, it having been actually delivery to the Quebec house: *held*, that the property in it was vested in the Newry house, and that the Quebec house had a right to retain it, against the Liverpool correspondent, on account of their lien on it, for advances made to the builders, and payment of custom house expenses, although, previously to the delivery, they had obtained an assignment of the ship to themselves from the builders, and had registered it, in the name of one of the partners in their house. (1)

The Respondent, on the 3rd July, 1826, instituted an action of *revendication* against the Appellant, for the recovery of some anchors and rigging; and, on the same day, the articles were seized by the sheriff, under a writ of attachment, or *saisie de revendication*, sued out by the Respondent. The Appellant pleaded the general issue. The facts in evidence, undisputed by either party, established that is is usual, for

(1) V. art. 1472 C. C.

British merchants, to give orders for building of ships to merchants, resident at Canada, as agents, on commission; and, for the Canadian merchant, to contract with the builder to advance him the requisite monies, according to the terms of contracting for materials and work in the colony, and to draw, from time to time, for such advances, on the British merchant, and for the British merchant to send out to the Canadian merchant the necessary rigging for the ship, and, also, a master to superintend the building of it, and navigate it to Europe.

Henry & Reid, merchants, resident at Newry, in Ireland, by a letter dated, 23rd August, 1825, directed the Appellants, merchants resident at Quebec, "to contract for the building of a vessel, to be called the "Ocean," to be complete in cabin, and every other thing, except the rigging; and they desired to be advised in good time of the Appellants having made the contract, so as to be able to send out the rigging; and they agreed to allow the Appellants two and a half per cent commission, for their trouble. Captain Maxwell was to have the command." The Appellants contracted with some ship builders, at Quebec, for the building a vessel, according, to this order, and, on the 26th of April, in the following year, when it was partly built, they took an assignment of it from the builders; they, soon after, registered it in the name of a partner in a branch of their house established at Greenock. Maxwell came to Quebec, in the spring of the same year, with a letter to the Appellants from Henry & Reid, directing them "to supply him with any money he might require for outfits, and to obtain the certificate of registry, so that they might register her on her arrival in Europe." Maxwell, on his way to Canada, from Newry, had stopped at Liverpool, and, there, took the Respondent, who was the Liverpool correspondent of Henry & Reid, to Messrs. Brown, Logan & Co., and ordered the rigging in question. On his arrival, Maxwell was employed to superintend the building of the ship. The rigging arrived at Quebec on the 21st May, with an invoice made out in the name of the Respondent, and a bill of lading, expressing that it had been shipped by the Respondent, and was to be delivered to "Capt. Thos. Maxwell, ship "Ocean," at Messrs. Rogerson, Hunter & Co.'s" (the Appellants). It was deposited in the Appellant's warehouses, and they paid the custom house duties, and other charges on it. In the June following, they dismissed Maxwell, the master of the ship, and an account was then made out between "the bark "Ocean," and owners, and captain Thomas Maxwell," in which his wages and expenses, from the time of leaving Ireland, were balanced, against the sums which had been advanced to him by the Respondent, as

the agent of Henry & Reid at Liverpool, and, by the Appellants, since his arrival at Quebec; but no mention was made of the money which they had paid for the duties and other charges on the rigging. The amount of the balance was paid by the Appellants to Maxwell. In May, 1826, the house of Henry & Reid stopped payment, the Appellants being then in advance on their account for the building of the ship.

Thus far the facts of the case were undisputed; but some difficulty arose on the evidence of Maxwell. He deposed, that, on the arrival of the rigging, he entered it at the custom house, and that it was landed under his direction; that he, then, removed some of it to Molson's wharf, and went immediately to procure store room for the rest of it; but, on his return, he found that one of the partners of the Appellants' house had removed the articles he had left; that the same partner, afterwards, borrowed a bower chain, which he, Maxwell, had removed, under the pretence of lending it, but he put it into the Appellants' stores; that the Respondent had desired the rigging to be delivered to him, Maxwell, and had sent them out for the purpose of being employed upon a vessel, provided they were paid for; that he, Maxwell, was agent for the Respondent, whose letter of instructions to him was, that he should hold the goods, until he received security for the payment for him, and that he had given the Appellants no permission whatever to take away the rigging, intending to keep it, in obedience to the Respondent's letter of instructions; that, on his producing, at the request of one of the partners, in the Appellants' house, the invoice and bill of lading, the partner retained and refused to return them, though asked repeatedly for them; that, when he ordered the goods, the Respondent, as well as Brown, Logan & Co., understood from him that the goods were intended for the vessel then building for Henry & Reid, and that the goods in question were given, by the house of Brown, Logan & Co., on the credit of the Respondent, who was debited in their books for the amount. The Appellants, to invalidate his evidence, proved, by the captain of the vessel who had brought out the rigging, that Maxwell had given him to understand that it was for a ship building in Quebec; by that of one of their own clerks, that Maxwell had, without any objection, delivered to him the invoice and bill of lading, on his application for them, by the orders of the Appellants, three weeks, or a month, after the settlement of the account: and, by that of a ship builder of Quebec, that he had applied to Maxwell for an anchor, sent out for the "Ocean," with a view of purchasing it; that Maxwell told him he should be glad to exchange it for a lighter one, but that he could not

take upon himself to do so, and directed him to apply to the managing partner of the Appellants' house, who he said was in charge of the anchor, it having been sent out for a vessel built by them, and that he, Maxwell, had no authority to dispose of the same.

The Court of King's Bench, on the 20th February, 1828, gave judgment in favor of the Respondent, with costs, which was confirmed by the Court of Appeals, on the 30th July, in the same year, from which this appeal was instituted.

SPANKIE (serjeant) and STUART, for the Appellants: The rigging was lawfully in possession of the Appellants, as part of the outfit of the ship they were building, for the house of Henry & Reid, at Newry. It had, for that purpose, been consigned, by the Respondent, the agent of the Newry house, and delivered over by Maxwell to the Appellants; it was subject, therefore, to all the rights of lien, which had accrued to the Appellants, both, on account of their advances in respect of the ship, and of their payments of the duties and other charges on the rigging itself. Neither the Appellants, or Maxwell, were ever the agent of the Respondent. Maxwell, indeed, after he had been dismissed from his situation by the Appellants, had pretended that he was invested with that character; but his story was contradicted in many points, unsupported in any, and altogether improbable. He pretended to have had a letter of instructions, which ought to have been produced, if it existed, at the time of the trial, or, if it did not exist, some evidence ought to have been given as to what had become of it: neither of these courses, however, was adopted; nor was a title of evidence offered to confirm his assertion, that he had acted as the agent of the Respondent, or even to prove that he had ever pretended to have been so, till the failure of Henry & Reid first suggested to the Respondent this plan of getting possession of the articles in dispute. The fact of the Appellants having, as the agents of the Newry house, paid the custom house duties upon them, clearly proves that they were not considered to have been consigned to Maxwell, as the Respondent's agent; and in the account which was made out upon his dismissal, although the Appellants had then the rigging in their possession, he never attempted to charge them with it. Putting Maxwell's evidence out of the question, therefore, as it must be, the Respondent's case cannot be supported. The goods, no doubt, were delivered to Maxwell unconditionally, and the case stands on the same principle as that of *Ogle* vs. *Atkinson*, (1) where the decision was, that an unconditional delivery of

(1) 1st Marshall, 323.

goods to the captain was an unconditional delivery to the owner of the ship, and that the property, therefore, vested in him. According to these principles, therefore, the property would have vested in the Newry house, from whom Maxwell held his appointment as captain, and whose agent he was. Admitting, however, Maxwell's evidence to be true, he no where says, that he told the Appellants that he was the agent of the Respondent, or that he had a letter of instructions from him; the same doctrine, therefore, applies; and the Appellants, having obtained unconditional possession of the goods, the property of them vested in the Newry house, subject to the Appellant's lien. The Respondent had lost all right, as an unpaid vendor, to stop the goods *in transitu*, because, by the delivery to the agents of the Newry house, the *transitus* was determined, and, according to the English law, he had no title to institute such an action. By the law of Lower Canada, an unpaid vendor may, in most cases, follow his goods in the hands of the purchaser, but this is one of the cases which *Pothier* (1) mentions expressly as exceptions from the general rule, when he says, that the *posseseur de bonne foi*, if he loses possession of the articles, may bring his action of *revendication* to recover them against the proprietor himself. Uninformed as the Appellants were by Maxwell of his character as agent for the Respondent, they must be considered as *possesseurs de bonne foi*. Even if they had lost the possession of the goods, they might have recovered them, and *à fortiori*, not having parted with that possession, they were entitled to retain it.

POLLOCK (K. C.) and PATTISON, for the Respondents: The courts below gave full credence to Maxwell's evidence, and founded their decision upon it; and Your Lordships' judgment, in the late case of *Santacana* vs. *Ardevol* (2) has established the principle, that it is the exclusive province of those courts to decide whether evidence shall be believed or not, and that their decision, on that head, shall not be questioned before you.

[MASTER OF THE ROLLS: That decision never was meant to establish the doctrine that this court could not examine the evidence of the *res gestæ*.]

Even if Maxwell's evidence was put out of the case, the decision must be for the Respondents; the property must have been delivered to them (if there was a delivery), under the impression that it was to be employed upon a ship belonging to the house at Newry. Now, at the time of that delivery.

(1) *Traité de la propriété*, partie 2nde, ch. I, art. 295.

(2) 1 Knapp's R., 269.

there was no ship belonging to that house on which it could be employed. The Appellants, in consequence, no doubt, of intelligence they had received of the approaching insolvency of the Newry house, had, by means of an assignment from the builder, and a registry in the name of some of the members of their firm, made the "Ocean" their own. It was a gross fraud, therefore, for them to receive these articles, for the use of a ship belonging to the Newry house, when they knew that, at the time of their arrival, there was no ship belonging to the Newry house in existence. It cannot even be argued, that they took out the registry of the ship in their own names, in pursuance of the directions from that house to take out a registry. The registry intended by that house was merely an interim registry, or certificate, until the ship arrived in Europe, under the 6th Geo. IV, ch. CX, not an absolute registry such as the Appellants had taken. The invoices of the goods were made out in the Respondent's name, and this circumstance furnishes convincing evidence, independently of the testimony of Maxwell, that the property of them was his. Supposing this to be the case, he had full right, according to the English law, on hearing of the insolvency of the Newry house, to give orders to his agents to stop the goods *in transitu*, *Fiese* vs. *Wray*. (1) The French law gave him further powers of preserving his property, for it allows the unpaid vendor to attach the goods in the hands of even a *bonâ fide* holder. The Custom of Paris states the law in these terms: "Qui vend aucune chose mobilière, sans jour, et sans terme, espérant être payé promptement, il peut sa chose poursuivre en quelque lieu qu'elle soit transportée, pour être payé du prix qu'il l'a vendue;" and *Pothier's* commentary upon this article, in his *Treatise de la propriété*, is: "Il résulte clairement de ces termes, *il peut sa chose poursuivre*, lorsque le vendeur a vendu sans jour et sans terme, la chose vendue, nonobstant la tradition qu'il en a faite, en quelque lieu qu'elle ait été transportée, en quelques mains qu'elle ait passé, demeure toujours sa chose, jusqu'à ce qu'elle ait été payée." (2) Another principle of French law is, that the property of a thing does not pass by the mere delivery of it; it is also requisite, that he who delivers it should deliver it with the intention of passing the property; he who accepts it should accept it with the intention of taking the property. This is also stated by *Pothier*, in the same treatise, in these terms: "Il faut que le consentement intervienne sur la personne à qui l'on veut transférer la propriété de la chose dont on fait la tradition, si

(1) 3d East, 93.

(2) Pothier's *Traité de la propriété*, partie première, ch. II, art. 242.

voulant me donner une chose, vous la donnez à mon homme d'affaires, comptant la lui donner pour moi, et qu'il l'ait reçue croyant la recevoir pour lui, cette tradition ne transférera la propriété de la chose ni à mon homme d'affaires, à qui vous n'avez pas voulu la donner, ni à moi, mon homme d'affaires ne l'ayant pas reçue pour moi, *si procuratori meo rem tradideris, ut meum faceres, is hâc mente acceperit, ut suam faceret, nihil agetur.*"(1) Here, the Appellants received the articles with the intention of applying them to the use of their own ship; they were delivered to them, for the purpose of being used in the building of the ship of Henry & Reid. The property in them, would not, therefore, pass to the Appellants, because there was not that consent or mutual understanding between the parties which the French law requires. In the passage cited on the other side, from *Pothier*, where he says, that if the agent sells contrary to the orders of the owner, the purchaser may revendicate the property from the owner, it is evidently pre-supposed that the purchaser shall have paid the purchase money. Now here the Appellants have never paid any thing. According to our own law, it is clear that goods which have been delivered by mistake can be recovered, *Litt* vs. *Cowley* (2) and no person can obtain a lien by a wrongful act, *Griffiths* vs. *Hyde*. (3) The action of *revendication* is indeed, in principle, like our action of trover, which has been termed an equitable action by lord Mansfield, in *Fitzroy* vs. *Gwillim*, (4) and nothing can be more inequitable than that a man should be allowed to retain goods, for which he has never paid, and which never would have come into his possession, except, either by fraud,or misrepresentation on his part, or misconception or mistake on the part of the agent from whom he obtained them.

SPANKIE, in reply : The Appellants were clearly the agents of the Newry house, and the delivery of the goods was made to them in that character; even if it had not been so, the Respondent had lost his property in them, by the delivery to Maxwell, who was also the agent of the Newry house. The sections that have been cited from *Pothier* do not bear upon the question; in the first quoted, the delivery proceeded on a mistake: the parties were not agreed, and, therefore, there was no contract; the second quotation only says, that, when no time for payment is stipulated, the present time is understood; and, thus, when goods have been delivered, on the

(1) *Ib.*, art. 233.

(2) 7th Taunton, 169.

(3) Selwyn's Ni. Pri. MSS., 1388.

(4) 1st T. R., 153.

understanding, that they are to be paid for by ready money, and no payment is made, the property of them remains in the vendor, and he may recover them. The reason for such a rule is plainly, because it is a fraud upon the vendor if the purchaser retains them without paying for them according to his agreement. Here, however, the goods had been delivered to the persons for whom they had been intented; and the reason why no contract was entered into with them, for the payment, was because the contract for that purpose had, of course, been entered into with the Newry house, and they were responsible for the payment. The case of *Trewhella* vs. *Rowe* (1) was very similar to the present. There, the owner of a ship had ordered stores of the Plaintiff; he then sold the ship to the Defendant. The Plaintiff delivered the stores on board the ship, after its sale to the Defendant, in pursuance of the orders he had received from its former owner, previously to its sale, and, afterwards, sued the Defendant for the payment. The Court of King's Bench, unanimously, held that the Plaintiff had no claim against the Defendant, because it was evident he must have furnished the goods on the credit of the former owner, and not of the Defendant. Here, it was clear that the Respondent had furnished the goods to the ship on the credit of the Newry house, and, on that account, in accordance with the principles established by the case of *Trewhella* vs. *Rowe*, the Respondents had no claim against the Appellants.

MASTER OF THE ROLLS: In this case Their Lordships are of opinion, upon the balance of evidence, that there was an actual delivery to Rogerson, Hunter & Co., of Quebec, and consequently, that the property did not belong to Isaac Corrie Reid. Their Lordships are not satisfied that Rogerson, Hunter & Co., had any fraudulent intention towards the Newry house, in this transaction. The register taken out by them might have been a reasonable measure of security to prevent the ship being seized by the creditors of the Newry house, which it appears they, at that time, suspected of embarrassment in its circumstances. The Quebec house did not cause the register to be taken in the names of the partners resident at Quebec, but in the name of a partner who resides at Greenock. Greenock is in the immediate neighbourhood of Newry, and the register might, therefore, have been taken in that name, with the view of affording facilities for an equitable arrangement with the house at Newry. Their Lordships are further of opinion, that even if there was a question, whether or not there had been a delivery to the Quebec

(1) 11th East, 438.

house, the delivery to captain Maxwell would have been a delivery to the Newry house, of which captain Maxwell was agent, so as to vest it in the Newry house. Two sections have been cited to us, from the works of Pothier, as to the French law that prevails in Quebec. In the first of these sections, it is said: " If goods be delivered to my attorney, for " the purpose of being delivered to me, and he receives them, " not as for me, but as his own property, the goods do not in " law pass to him. " Now, it is perfectly clear, from the Latin quotation, that the meaning of that section is, that, if he, by mistake, receives them, considering them to be delivered to him personally, and not to him as agent for me, it necessarily follows that a delivery, by mistake, passes no property. The Latin quotation is, " Si procuratori meo rem " tradideris, ut meam faceres, is hâc mente acceperit, ut suam " faceret, nihil agetur. " (1) If he receives it as his own, believing it is intented for him, when, in truth, it is not intended for him, but for me, who am his principal, then no property passes, it is a mere delivery by mistake. The other section of the French law, which has been cited, is this: " Qui vend " aucune chose mobilière, sans jour, et sans terme, espérant " être payé promptement, il peut sa chose poursuivre en quel- " que lieu qu'elle soit transportée, pour être payé du prix " qu'il l'a vendue." That is, that he, who has sold a thing without naming the day of payment, or fixing the time of payment, is to be understood as selling for ready money ; and, if a contract be made for ready money, and the purchaser possesses himself of goods under that contract, he does not obtain the property in those goods, till he has made the payment according to that contract. This has no application to this case. Upon the whole, therefore, Their Lordships are of opinion that the judgment below must be reversed.

Judgment reversed. (2) (*Stuart's Rep.*, p. 412.)

(1) Pand., 41, tit. I, ch. XXXVII, § 6.

(2) The decision of this case was postponed, on the first day's hearing, in order that Their Lordships might obtain the assistance of lord Tenterden, who was present at the second day's argument and the judgment.

This case is reported in *Knapp's* Reports of cases before the Privy Council, p. 362.

CORPORATION.—ACTION TO ACCOUNT.

COURT OF KING'S BENCH, Quebec, 20th October, 1830.

KEYS, against the QUEBEC FIRE ASSURANCE COMPANY.

Held: That a stockholder in a joint stock company can bring an action of account against the corporation, and thereby contest the validity of a bye-law made by a board of its directors. (1)

This action was instituted, for the purpose of trying the validity of a bye-law passed by a board of directors of the Quebec Fire Assurance Company, on the 23rd day of February, 1830, directing "that, after the 31st day of March, then next, the discount to be allowed to stockholders, upon the amount of premiums to be paid to the company, should be 33½ per cent, and that all stockholders should be entitled to such discount, to the annual amount of £500, for each share." The Plaintiff was a stockholder, and demanded from the company an account of the profits to which, as proprietor of ten shares therein, he was entitled, according to the articles of accociation. Not having effected any insurance with the company, this bye-law deprived him of a third of his share of the profits arising from such insurances as were effected by other stockholders, and devided the tariff of premiums established by the articles of association, into two different rates, one applicable to stockholders effecting insurances with the company, and the other to individuals, not stockholders, also effecting insurances. Upon a demurrer, it was urged, that the action had been improperly brought, in making the illegality of the bye-law a specific ground of action, whereas the bye-laws of any corporation were not within the jurisdiction of a court of law. (2)

SEWELL, CH. J.: This case is an important one, not only to the parties concerned, but to all the partners in every joint stock company. It has been argued, upon the demurrer, that no action can be brought specially, by one partner of a joint stock company, against the company, as a corporation, in the same manner as the partner of a mercantile firm could not maintain an action against another partner for any claim arising out of the partnership. But, here, there was no demand of money no claim of debt, there was nothing but the demand

(1) V. art. 1890 C. C.

(2) Cases cited at the hearing, in support of this action: *The King* vs *Whitstable company of Free Fishers*, 7 East, 353; *Adley* vs. *the Whitstable company*, 17 Vesey, 315; Lord Chancellor's decision in the same case, 1 Merivale, 107; *Adley* vs. *Reeves*; 2 *Maule* vs. *Selw.*, 53.

of an account; and the declaration was a mere narration as to the grounds on which the Plaintiff considered the bye-law, or resolution of the directors, which he complained prejudiced him, as insufficient and contradictory to the articles of association of the company. It was an account, and nothing but an account that was asked for. The counsel for the company has admitted that an account existed in conformity with the resolution in question, which it was denied the Plaintiff could legally object to in a court of law, but, if he could not bring it before this court, he would be remediless, in case that account was incorrect or unjust. In the case of *Adley* vs. *the Whitstable fishery and dredging Company*, in which the validity of a bye-law was called in question, it was laid down by lord *Eldon*, that a partner of a joint stock company has a right to bring an action against the corporation of which he is a member, for "if the consequence of such management, in forming bye-law, is that a court of law cannot enter into the validity of a bye-law, the question is whether this court will not hold jurisdiction for the purpose of sending that question to a court of law, otherwise, the most unreasonable thing might be done, without a remedy in any court." The mode of trying the question of the validity of a bye-law, appears to be by an action. Here, if such an action in common law can be maintained, it appears that this action may, and the general allegations of the Defendants are met by this case. There is a special allegation, however, that the declaration does not state any refusal to grant the account desired; but this is in fact an application to set aside the bye-law of the directors, there is no conclusion, no prayer for judgment of a debt claimed, so there need not be any statement of a refusal to grant an account. But it is shewn, on the face of the declaration, that the account required would never have been obtained, had it been asked, it being considered that the Plaintiff was not entitled to any portion of those profits which were given up to certain stockholders, in consequence of the resolution in question. The declaration thus accounts for there being no demand of account made, nor any refusal to grant it.

Demurrer overruled. (*Stuart's Rep.*, p. 425.)

BANKS OF NAVIGABLE RIVERS.

COURT OF APPEALS, Quebec, 17th November, 1830.

On appeal from Quebec.

LOUIS FOURNIER, Appellant, and JAMES OLIVA, Respondent.

Held: That the banks of navigable rivers belong to the riparian proprietor, subject to a servitude, in favor of the public, for all purposes of public utility. (1)

This was an action by the Appellant, Plaintiff in the Court of King's Bench, against the Respondent, *en complainte*, for having trespassed on the Plaintiff's land, and erected a fence on the front thereof adjoining the river Vase, to the damage of the Plaintiff of ten pounds, with the usual conclusion. The Respondent pleaded the general issue. It appeared that, to a certain extent, the river bounding the front of the Appellant's land, was a navigable river, and that, in the place where the fence was erected, the ordinary tides came nearly to the bottom of the pickets, but that the highest tides rose nearly to the top of the pickets: that the Appellant and his predecessors had, for 30 years and upwards, been in the possession of the land where this fence was erected, and had usually cut hay upon it. The Court of King's Bench dismissed the action, considering the place where the fence was erected to be public property, in which the Appellant could have no possession to entitle him to maintain his action.

REID, CH. J.: The action was well brought in the court below, and the Plaintiff was entitled to judgment. The banks of navigable rivers belong to the persons whose lands adjoin those rivers, subject, however, to the restriction in favor of all His Majesty's subjects of free communication with the river, for all purposes of public utility. By the Roman law, the banks of navigable rivers belonged to the proprietors of the lands adjoining such rivers; and previous to the ordinance of 1669, no statutory law in France, to the contrary, could be found. It has been maintained by some writers, treating of the construction to be given to this ordinance, that, as a road of twenty-four feet was thereby reserved, along the banks of navigable river, for public purposes, the bank of the river was to this extent, to be considered as vested in the Crown, and as public property. But this opinion has been controverted by so many other writers of greater weight, and, upon such strong grounds, that the court cannot hesitate in rejecting it, and, therefore, reverses the judgment of the court below, and enters judgment for the Appellant. (*Stuart's Rep.*, p. 427.)

(1) V. art. 400 C. C.

PARTNERSHIP PROPERTY.—LIABILITY.

COURT OF APPEALS, Quebec, 17 November, 1830.

On appeal from Quebec.

GEORGE MONTGOMERY, Appellant, and SAMUEL GERRARD and others, executors, etc., Respondents.

Held : That partnership property is not liable for the debts of any of the partners individually. (1)

An action of debt was instituted by the Appellant, as executor of the last will and testament of the late Matthew McClure, against Francis and William Hunter, as co-partners, on their notarial obligation dated 1st June, 1811. In consequence of an execution sued out on a judgment rendered against the Defendants, several lots of land, the property of the said copartnership, were seized and sold. An opposition was fyled by the Respondents, executors of the late David David, claiming the monies levied, founded on a notarial obligation executed by Francis Hunter, one of the Defendants individually, on the 7th November, 1794, which had been assigned to the said David David. It was considered by the court below, that there being a priority of mortgage in favor of David, it would attach upon the property of the partnership, which had been seized and sold under the execution, and, thereupon, the monies levied were adjudged to the Respondents.

The reasons assigned by the Appellant, upon this appeal, were: 1° that, by the law of this country, the creditors of a company have exclusively set apart to them the partnership estate, for payment of their debts, against the company. The particular creditors of the firm have no claim upon the property of the partnership, except when there is a surplus after the payment of all the partnership creditors; and, then, the creditors of each of the particular partners have a right to be ranked on the portion of their debtor in that surplus: whereas, in this case, the particular creditor was allowed to be ranked upon the proceeds of the joint estate, to the exclusion and prejudice of the creditors of the joint fund. 2° That a creditor cannot, by law, have any other or greater interest in the property of his debtor, than the debtor himself had, and that the right of Francis Hunter in the property seized in this cause, was one subject to the payment of the joint debts under the rule, *bona intelliguntur cujusque, quæ deducto ære alieno supersunt.* And that, by the judgment complained of,

(1) V. art. 1899 C. C.

there was given to the Respondents a greater interest in the subject seized than was possessed by the debtor.

PER CURIAM: Partnership property is not liable to the payment of the debts of individual partners, nor can a partner have any separate disposable interest in the partnership property over which his creditors could exercise any control, until it has been first ascertained what is the separate interest of that partner in the partnership concern, after the debts are paid. The judgment of the court of King's Bench is, therefore, reversed, and the monies levied, ordered to be paid over to the Appellant. (*Stuart's Rep.*, p. 437.)

NOTARY.—WITNESS.

COURT OF APPEALS, Quebec, 17th November, 1830.

On appeal from Quebec.

AUGUSTIN ROUTIER, Appellant, and THÉRÈSE ROBITAILLE, Respondent.

Held : That a notary public cannot be compelled, upon an inscription *en faux*, to give evidence touching the validity of any instrument executed before him. (1)

This was an action instituted by the Respondent, in the Court of King's Bench at Quebec, against the Appellants, *en délivrance de legs*, under the last will and testament of the late François Bonneville, the husband of the Respondent. The Appellants fyled an inscription *en faux* against the will, as not having been made and executed in the manner prescribed by law for a *testament solemnel*, and in the manner certified by the notary in whose possession the minute was deposited. In support of the *moyens de faux*, several witnesses were examined by the Appellants, and amongst others the two notaries before whom the will was made. The Respondents as well as the notaries themselves objected to their being examined touching the validity of the *acte*, which they had executed as public officers, but the objection was overruled, and they were examined. The court below, however, considered that the will had been regularly made, and rejected the inscription *en faux*.

PER CURIAM: The judgment of the Court of King's Bench must be confirmed, but, according to the decisions, under the law of the country, the notaries could not be examined as

(1) V. art. 252 C. P. C.

witnesses, and, as public officers, they could not, by law, be compelled to give evidence to controvert the truth of what they had certified as such, touching the execution of any act passed before them.

Judgment affirmed. (*Stuart's Rep.*, p. 440.)

STEAMBOAT.—COLLISION.—RESPONSIBILITY.

COURT of APPEALS, Quebec, 20th November, 1830.

On appeal from Montreal.

WILLIAM MAITLAND and others, Appellants, and JOHN MOLSON and others, Respondents.

Held: That in a cause of collision, by one steam vessel against another, where the loss was charged to be owing to negligence of the Defendants, the court, being of opinion that the damage was occasioned by such negligence, pronounced for damages and costs. (1) *Quære*, whether, under certain circumstances, one moiety of the aggregate amount of the damage should not be borne by each party. (2)

Near the port of Sorel, or William Henry, considerable damage was occasioned to the *New Swiftsure*, a steamboat belonging to the Respondents, by her coming into collision with the *Hercules*, a steamboat belonging to the Appellants. An action was brought in the Court of King,s Bench, at Montreal, by the Respondent, for damages, occasioned by their collision, on the 23rd June, 1826, owing, as alleged, to the negligence, carelessness and unskilfulness of the servants of the Appellants, in directing and managing the Hercules, by means whereof the New Swiftsure was much damaged, and divers goods, wares, and merchandize, then shipped on board of her, were damaged, and the Respondents compelled to lay out a large sum of money in repairing their steamboat and whereby they were deprived of the use of their vessel during twelve weeks, etc., to the damage of the Respondents, etc. The Appellants pleaded the general issue. The judgment of the court below awarded a certain amount of damages to the Respondents, being the amount charged for repairs, the loss of profit on the trips of the New Swiftsure, during the time she was laid up, and a portion of the sum claimed for furniture, etc., damaged and destroyed by the collision. From this judgment the Appellants instituted this appeal, on the ground that, at the trial negligence and unskilfulness, on the part of the

(1) V. art. 1053 et 1054 C. C.

(2) V. art. 1203 C. C.

persons managing the Hercules,had not been shewn, so as to entitle the Respondents to a judgment in their favor. The Respondents also appealed, on the ground that the damages awarded were insufficient to cover the loss and damage that had been occasioned. By the evidence adduced, it appeared that the New Swiftsure entered the port of William Henry, on the eastern or left side, and the Hercules, on going out, came down upon her in an oblique direction from the mid-channel towards the same side. That there was room for three or more steamboats to have passed abreast. That the New Swiftsure had the usual lights at her bow and stern, and fired her usual signal gun, that her captain and passengers did not perceive any light in the bow of the Hercules, nor did several persons who were standing on the shore at William Henry. On the other hand, it was proved, by persons on board of the Hercules, her passengers and crew, and by a sailor who hung out the lantern, that there was a light on the larboard or left bow of the Hercules, being where it was always placed, that the signal gun was fired, that the lantern in her bow was broken by the collision; its being placed on the left side was accounted for, because, as was alleged, it was a constant rule for steamboats on the St. Lawrence to pass each other on the right or starboard side. The testimony was conflicting, but, it however appeared that the general course for steamboats, in entering and going out of the port of Sorel, was to go in by the eastern bank, and return by the western, until, after some accidents, one of the steamboat proprietors established a rule for all steamboats on the St. Lawrence to pass to the right of each other. And the master of the Hercules, with pilots and others, testified that such had been the rule, since 1821, in going in and out of the Richelieu. Again, other pilots and other persons testified that they always went in on the eastern side and out on the western side. The master of the Swiftsure, particularly, testified to this fact.

SEWELL, CH. J.: This case is of considerable importance, considered, either with reference to the intent of the parties, or to the necessity of establishing a principle of law, as to collision between steam vessels, an entire novelty in jurisprudence. Ships are impelled by outward agents, by winds and by waves, and the same principles of decision are not applicable altogether to vessels whose means of propulsion are within themselves. Ships cannot always avoid coming in contact; steamboats can, and the ancient jurisprudence cannot be properly applied to both cases. The facts of the case are that two steamboats met each other, while one was leaving and the other entering the port of William Henry. By the French law, which is our guide, the damages sustai-

ned by the *abordage* of ships, if owing to imprudence, neglect or unskifulness, it was evident, either one or the other must be charged with it, but, when difficult or impossible to ascertain which was in fault, the rule to be followed was to apportion the damage between them. If this rule held good as to ships, it ought, *à fortiori*, to be followed as to steamboats, as they contained within themselves their own power of propulsion. It has been attempted to shew negligence on the part of the Hercules, and that she had no lantern in the bow, where it was customary to place a light: the witnesses, on board the New Swiftsure, saw none, two witnesses, on the shore, swore that neither did they see the light, this was but negative testimony, whilst two who were one board the Hercules say positively there was a light, that they did see it; and after the shock saw the broken parts of the lantern, this was positive not negative evidence. It has been attempted to prove also that an understanding existed between the boats, as to the particular course they should pursue, in entering and leaving the port of William Henry; on the other hand, it appeared, that, in consequence of previous accidents, Molson had given directions to his steamboats, always to take the right. There did not appear to be any distinction made as to any port or river, but the directions were general. The Appellants had a knowledge of this, and Brush, the master of the Hercules, doubtful of the course he ought to pursue, whether, as by former custom, he ought to keep to the left, or now, in consequence of the general directions of Molson, keep to the right, applied to the pilot for his opinion, and it, must be remarked that, coming out of port, the vessel was, more particularly, in charge of the pilot; to this, the pilot made answer he would take the right, as he was then bound to do, *comme je dois faire*. On the other hand, the New Swiftsure adhered to the custom previously established, and attempted also to take the right. It could not here be said that any bad intent attached to either side, and counsel had admitted it was accidental, and disclaimed imputing wilful motives or culpable negligence to the Hercules. It appeared, therefore, that each party was in the act of prosecuting what he thought right, and it could not be said that there was a greater degree of imprudence or negligence on one part than on the other. These facts leave an impression on my mind that the collision was purely accidental, and I now proceed to refer to those laws which, I think, bear upon the case. In the *Code marine*, of 1681, liv. III, tit. VII, there are two articles on this particular subject. In the 10th, it is said: " En cas d'abordage de vaisseaux, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, en

rade, ou au port." And, by the 11th: "Si toutefois l'abordage avait été fait par la faute de l'un des maîtres, le dommage sera réparé par celui qui l'aura causé." Thus, by the first, collision was considered, *prima facie*, as an accident; whilst, the second shews that it shall be permitted by the captain, on either side, to prove that it was occasioned by the imprudence or negligence of the other. This law is not, however, cited as the law of this country, for, it was, as such, superseded at the conquest, when the rules of the Vice-Admiralty Court of England were substituted. The *Code marine* was but a declaratory statute, as to what should be considered the principles of the Roman law previously existing; though, it differed from that in this respect, that, in case of pure accident, the damage was borne, without remedy, by the suffering vessel. By the Roman law, if it were an accident, each party had to bear his own damage, by the *Code marine*, a moiety of the entire damage aggregated into one mass, which was to be borne by each vessel, without regard to the size of either. Under the ancient law of this country, no doubt can exist that the damages in this case would have formed an aggregate, one half to be borne by the proprietors of the Hercules, and the other half by the proprietors of the New Swiftsure. I am strongly struck with the propriety and equity of this, and, still more, with the great advantage which it would, evidently, be to the public, if this principle were fully adopted. It would be productive of the utmost care and attention, on the part of managers of steamboats, who, if they were conscious they would have to pay a moiety of the entire damage, would compel every man on board to act most vigilantly and carefully. This is the more evident, when the self propelling power which steamboats possess is considered, compared with the liability of ships to be influenced by outward agents. Such a principle would produce a saving of thousands of pounds to individuals, and would greatly augment the confidence of every person who had to risk his life and property on board of steamboats. Long experience, in France, had shewn that it is a right principle, and, in the new *Code de commerce* we find: "If it is doubtful to determine by whose fault the damage occurred, it shall be repaired *à frais communs*, and *experts* appointed to determine the amount (art. 407), whilst, if the collision be purely accidental, the damage must be borne, without remedy, by the vessel that sustained it; and, if by the fault of one of the captains, then by the one who occasioned it. In the present case, there appears no possibility of discovering the author of the accident; and, for my own part, I am of opinion that the

damages incurred should be referred to *experts* to estimate, and that one half should be borne by each party.

SMITH, executive councillor, coincided in opinion with the CHIEF JUSTICE, but KERR, justice, and the majority of the court beeing of a different opinion, the judgment of the Court below was affirmed, and the appeal of the respondents dismissed.

The SOLICITOR GENERAL took occasion to correct an error of the Chief Justice, in stating that the Respondent's counsel had admitted the collision to have been accidental, and not proceeding from culpable negligence, whereas it had been admitted that there was no malicious or wilful intent, but it had been averred that the collision was occasioned by gross negligence. *(Stuart's Rep.*, p. 441.)

In a cause of collision, against a steam vessel, the High Court of Admiralty, assisted by trinity masters, pronounced for damages and costs; holding that the steam vessel, being more under command, and, manifestly having seen the other vessel, was to blame. The trinity masters observed; whether the wind was N. W., as represented by the steam vessel, or N. N. E., is of no very great importance, as the vessel not receiving her impetus from sails, but from steam, should have been under command. Steamboats, from their greater power, ought always to give way; upon this consideration, and, also, being satisfied that the steam vessel had seen the other vessel, they were of opinion the steam vessel was to blame. The court, adopting this view of the case, gave judgment accordingly. (*The Shannon*, Pennefather 2 Haggard's Adm. Rep., 173.)

PRESBYTERIAN CONGREGATION.—PARISH REGISTERS.

COURT OF KING'S BENCH, Quebec, 15th February, 1831.

JOHN CLUGSTON, ex parte.

Held: That a minister of a presbyterian congregation, in communion with the church of Scotland, is entitled to registers, for marriages, baptisms and burials, notwithstanding that, in the place where he officiates, another church, also in communion with the church of Scotland, has been previously established, under the authority of the government.

Quære. As to any right in the minister to fees, for entries in such registers.

This was an application, by petition, on the part of the reverend John Clugston, minister of the presbyterian congregation of St. John's church in Quebec for two registers, numbered and authenticated, *paraphé*, under the statutes, 35th Geo. III, ch. IV, 44th Geo. III, ch. II, and 9th Geo. IV, ch. VIII, for registering marriages, baptisms, and burials: against which a caveat had been entered by Dr. Harkness, the minister of St. Andrew's church, at Quebec, in commu-

nion with the church of Scotland. The Petitioner set forth that, on the 5th January, 1825, he had been licensed by the presbytery of Glasgow to preach the gospel, and, having been appointed to be minister of a certain protestant church, or congregation, in Quebec, in communion with the church of Scotland, called St. John's church; he had been ordained to the ministry, on the 16th June, 1830, at Forfar, in the form used by the church of Scotland.

The principal objections to the application were, 1. That there is, in Quebec, but one protestant church or congregation, in communion with the church of Scotland, of which there is and has been, since 1820, a minister, recognized as such by an instrument of the governor, Sir Peregrine Maitland. 2. That St. Andrew's church is sufficiently large to accommodate all the congregation of the church of Scotland, and that he is able to discharge the ministerial duties towards all the said congregation. 3. That according to the laws of the church of Scotland, no second church can be erected without notice to the minister and elders of the first, and that no notice had been given. 4. That, up to the Petitioner's arrival, the congregation of St. John's chapel was not in communion with the churches, either of Scotland or England, and that their tenets differed from both.

The case was first argued by the counsel of the petitioner, before the Chief Justice at chambers, when it was contended that, if the privilege claimed by the minister of St. Andrew's church were to be admitted, they could go to the utter exclusion of every other branch of the same church and, if so, how could a second church be ever erected? The congregation of St. John's church was a congregation *de facto*, which appeared from its number being upwards of 200. That there are no stated ecclesiastical divisions of the Scotch church in Lower Canada, and there is no more repugnancy in there being one congregation in St. Anne street, and another in St. Francis street, depending upon the same general presbytery, than there would be in a Scotch congregation being formed at Quebec, and another at Cap Rouge, Batiscan or any other place. The distinction of theological tenets is perfectly irrevelant, the discipline and government of the congregation being alone in question. The examination, admission, and ordination of ministers belong to the general presbytery, and its power cannot be controled by the minister of St. Andrew's church, or by gouvernment. The interference of the governor was illegal and void, it was interfering with the religion of the empire.(1) The colonies belong to the empire, and not to the

(1) 5 Anne, ch. VIII.

Crown alone. (1) With regard to the evidence of the forms being observed, etc., they were not material, for the act of the presbytery was a judicial act, and *omnia præsumuntur rite et solemniter esse acta, donec in contrarium probetur.* (2) There is, therefore, a due guaranty, for the only guaranty the legislature contemplated was a regular ordination in one of the established churches.

It was urged, in support of the caveat, that a congregation was not known to the court or government, only a church; that, in fact, the association of protestant christianity, who assembled at the St. John's chapel, were no more part of an established church than a lodge of freemasons, or a cricket club; they were, speaking of them as religionists, in facts, congregationalists, a set of protestants who reject all church government, except that of their own individual congregation, under the direction of one pastor: registers are given for public purposes, and inheritance of property of every description depends on them: this is but an application of a private society, and where is the guaranty, as to the regular and proper keeping of them? To keep registers and take fees for the entries would be infringing upon the legal ecclesiastical emoluments of the only minister of the church of Scotland, who is acknowledged by proper authority; and the application has been made, without the knowledge of several members of their own society. We do not object to the Petitioner's officiating as a minister of the gospel, nor to the act of the presbytery licensing him to preach, but there is no evidence of the forms prescribed having been followed, as to the ordination, or of a special ordination to this chapel; which, if it be in communion with the church of Scotland, can only be considered in the light of a chapel of ease.

KERR, J.: This reverend gentleman has brought himself within the spirit and the very words of the act, and cannot be refused his register: as to any fees upon burials, etc., that is not a question with which the court has any thing to do.

SEWELL, CH. J.: When this question was brought before me, at chambers, I preferred to leave it to the court, that it might be more publicly agitated and known. Having been twice called on to consider it, once, when a barrister, and afterwards, whilst holding the situation I have now the honour to fill, I am well prepared to enter all its bearings; but, coinciding perfectly in opinion with my brother judges, in this instance, it is not necessary to dwell at great length upon it: as there are no special circumstances attending this case. By statute,

(1) Vaughan, 402.

(2) Erskine, 1, 5, 10, p. 55, and Glassford, 515, 516.

all protestant churches established in a certain way are entitled to have authenticated registers; but there is a wide difference between the right to keep a register, and the right of demanding fees for entries therein. The court is bound to give a register to this individual praying for it, who, it is admitted is an ordained minister, within the words of the statute, (1) it is given in obedience to the statute, but we give it to the Petitioner to make use of it in such a way as the law may allow. If, by any means, any other party is injured, he has his right of action, we do all we can do, direct the register to be authenticated (*paraphé*), leaving the individual to make use of it at his own discretion, and upon his own responsibility. The statute grants a register to the minister performing parochial or clerical duty, and here is a distinction, the minister doing parochial duty could take his fees, whether by law or conventional agreement; but, not so a minister simply performing clerical duty: and, with respect to these duties, a difference might likewise be made; baptisms and burials are ecclesiastical duties, but marriages are partly civil and partly ecclesiastical, and, I do not think that they come within the term of clerical duties simply. It has been asserted that the congregation of whom the Petitioner is the minister is only a private society, and, if it were so, and he had no other right, it could not be supposed that a lodge of freemasons, or, any other private society, could appoint any one, and constitute an officer to carry on the provisions of a statute; but the Petitioner dit not come forward as the minister of a private society; he stood before the court in a public capacity; he calls himself an ordained minister, ordained by due authority, which is admitted because not denied; he is no doubt, therefore, within the letter of the law. If, however, he assumes a right, in consequence of this register, to do what Dr. Harkness contends he alone has the right to do, to take fees, he must do it at his peril. I have before me a case that occurred in Scotland. It was that of an episcopal congregation, from which there were dissenters, and not belonging to the established church, or parochial regulations; the court found that the parish register alone was entitled to fees, and that the clerk of the sessions could officially recover from all persons the fees of right due to the parish. Here, under the same rule of discipline, Dr. Harkness may say, mine is the mother-church; and by granting this register, it must be understood that the court does not, and cannot affect the rights of any party.

Judgment for the Petitioner. (*Stuart's Rep.*, p. 448.)

(1) Vide supra, 154.

ATTACHMENT.—VESSEL.

COURT OF KING'S BENCH, Quebec, 4th April, 1831.

PARANT and another, against GRENIER.

Held : That, a vessel loaded and ready for sea, can be arrested for a civil debt unconnected with the ship. (1)

On the 19th day of November, 1827, Olivier Grenier caused an attachment to be made of the brigantine "Barbadoes," then ready for sea, belonging to Parant and Bisson on a demand for the amount of a promissory note. The vessel was, thereby, prevented from sailing, until security was given. She sailed on the 23rd, and was wrecked in the St. Lawrence, two days after her departure. The action in which the attachment issued was afterwards dismissed, and the seizure declared null, on the ground of the note not being due when the action was instituted, and this was an action for damages alleged to have been caused by the illegal seizure of the vessel.

HUOT, for the Plaintiffs; HAMEL, for the Defendant.

KERR, J.: The question, in this case, is whether a vessel can be detained for a civil debt unconnected with the ship, when she is loaded, cleared and ready for sea? By the act of the Defendant, she was detained until the 23rd November. So late in the season, as to expose her to the greatest risk, and, whereby, her loss was probably occasioned. There are rules arising out of the growth of maritime commerce, other than the mere letter of the law, by which this case should be decided. The 10th and 11th articles of the French ordinance of 1681, which regulated maritime cases, gave to the judges of the Admiralty Court extensive power, but, no where, authorizes them, by a *saisie-arrêt*, to detain a ship when afloat, far less, when ready for sea. No vessel when afloat can be seized, unless for a maritime debt, *usages et coutumes de la mer*. Debts *purement civiles* are excluded, upon the principle that the ship is under mortgage, for performance of the charter party, and mortgaged also to the cargo, for performance of the voyage, whilst the goods are bound to the vessel for freight and general average. If by the old Admiralty law, a vessel afloat cannot be attached, but for a maritime debt, it certainly cannot, by the ordinance, 25th Geo. III, or by the 34th Geo. III. In England, in the Lord Mayor's Court, where the powers of attachment are the most extensive of any, ships, or goods laden therein, are specially

(1) V. art. 834 C. P. C.

excepted, and not liable to attachment. This exception is for the protection and preservation of commerce. If attachments of this nature are sanctioned in this port, the shipping interest must greatly suffer. It has been argued that, at the most, this is an action for a trespass, without any proof of malice; but a misuse of the process of the court has been made, and the innocence of the intention is not to be considered. I am of opinion that the Plaintiffs are entitled to judgment.

SEWELL, CH. J.: The question is not whether any loss has ensued, in consequence of the seizure, but, whether the vessel was seized according to law. We have no occasion to refer to the laws of England, as we have a statute of our own (1) which renders the estate, debts and effects of a debtor, of what nature soever, and whether in the hands of the owner or of any one else, liable for debt. We may go farther, and look to the old Franch law. The ordinance of 1681, to do away with the French common law, declared that ships should not be liable to attachment. This ordinance was set aside by the introduction of English Admiralty law, and the exemption of shipping destroyed. Between the 14th and 27th of the King, many ships were attached, and it was, then, thought proper to interpose a certain protection, but that was afterwards taken away by the 27th and many instances of attachment and sale of vessels have occurred. The law being positive, any reasoning upon the interest of trade or shipping is unavailing. So far as to the law, then, as to the facts of this case; the damage is too remote to be charged to the act of seizure; the seizure took place on the 19th November, security was given on the 20th, and the impediment to the sailing of the vessel removed. How did it happen that she did not go to sea until the 23rd? Damages, then, which were charged to one cause were occasioned by another.

BOWEN, J., concurred in the foregoing opinion.

Judgment for the Defendant. (*Stuart's Rep.*, p. 453.)

PROMISSORY NOTE.—USURY.—INTEREST.

COURT OF KING'S BENCH, Quebec, 20th June, 1831.

MCLEOD, against MEEK.

Held: That in an action of assumpsit, by the endorsee against the endorser, upon a note endorsed for a sum less than that made payable by the note, the Plaintiff cannot recover. (2)

(1) Vide supra, p. 309, in note.

(2) Par le § b de la sec. 32 du ch. XXXIII des Stat. du Canada de 1890, 53 Vict., "*l'acte des lettres de change, 1890*," il est décrété que l'endossement doit

This was an action of assumpsit for the recovery of £19 from the Defendant as endorser of promissory note for £25, endorsed by the Defendant in blank.

Plea : The general issue, and usury in the transfer of the note to the Plaintiff. The note was offered to the Plaintiff by the Defendant, who was indebted to the Plaintiff in a small sum. The latter refused to advance any money upon it, but advised the Defendant to apply to the banks where, if the note were good, it would be discounted. The Defendant made a second offer of the note to the Plaintiff, stating that he could not get it discounted, and requested cash for it, as a favor ; he stated also, that he would consent, on account of the risk to be incurred by the Plaintiff in taking the note, the credit of the maker being doubtful, to take less for it than its real amount. The Plaintiff then paid £22 10s. for the note, when it was endorsed, and delivered over to him.

HAMEL, for the Plaintiff, contended that, as the note was delivered by the Defendant, after the actual risk was fully established, both as respected the maker and endorser, the transfer could not be considered otherwise than a *bona fide* sale, the sale of a debt due, such sales being sanctioned both by the French and by the English law (1) and therefore, the contract was not at all usurious.

GAIRDNER, for the Defendant : All the requisites to constitute usury are fully apparent in this case. There is a loan of £22 10s., the money to be returnable at all events, and the sum of £2 10s. taken as a discount for the time that the note had to run, a sum equal to about 50 per cent par annum, contrary to the provisions of the ordinance, 17 Geo. III, ch. III. The advance of the money is admitted, and the obligation to repay was imposed by the Defendant's endorsement. The nature of the contract cannot be altered by calling it a sale, and where a loan is the real object and intention of the parties, no colour or form can give it a legal effect, if usurious.(2) Taking more than the legal interest upon the discounting of notes, has been uniformly held to be usurious, since the decision of the case of *Massa* vs. *Dauling*. (3) It was, even, for-

couvrir la valeur totale de la lettre de change. Un endossement partiel, c'est-à-dire, un endossement qui ne transférerait au bénéficiaire par endossement qu'une partie seulement de la somme à payer, [illegible] transférerait la lettre à deux bénéficiaires ou plus séparément, ne com[illegible]ne négociation de la lettre.

(1) Pothier, *Vente*, n° 574 ; Ib., *Contrat alé*[illegible] s' *Statutes*, [illegible] Jacob's *Law Dict.*, verbo *usury*

(2) *Lowe* vs. *Waller*, 2 Douglas, 736 ; *Barc*[illegible], 4 East, [illegible]

(3) Str., 1243.

merly held to be usurious, if the interest were deducted before the expiration of the time for which the principal was forborne. (1) This decision was afterwards modified in favor of bills, on which it was allowed to take interest in advance, and, at a later period, the courts decided that a sum greater than the legal interest might be taken as a remuneration for the additional expense incurred in an establishment for discounting, or for the risk and trouble of remittance. (2) But this remuneration must be reasonable. In *Brooke* vs. *Middleton*, (3) the Defendant, in discounting, had charged 7s. 6d. per cent, but no evidence was given of extra expense or considerable trouble, and lord *Ellenborough* was of opinion that the transaction was usurious. The Plaintiff has supposed that, by not demanding payment in full, he can recover on the note, but the usury is in the inception, not in the execution of the contract. Our ordinance, in conformity with the English law, makes all securities tainted with usury, void. In *Masterman* vs. *Cowrie*, lord *Ellenborough* said, " A debt founded on usury is no debt at all." When there is usury between endorser and endorsee the note is vitiated, and no action can be maintained on it. (4) As respected th risk there was none greater in this case than in any other, the risk that had been incurred was the ordinary risk of insolvency, incident to all loans and credits generally. If the Defendant had not been a party to the note, but had transferred it *sans recours*, without prejudice, he might have been justifiable in taking more than legal interest, for, in that case, there would have been more than ordinary risk. The true criterion by which this case should be decided, is to be found in *Evans'* statutes, (5) where, after stating that there are many cases in which it is taken for granted, that, deducting more than legal interest, for the discount of a bill, for the time it has to run, is usurious, he adds, " I conceive that these cases are only considered applicable when the party from whom the discount is taken, is to bear the risk of the solvency of the other parties, and not when the bill is purchased for a smaller sum than the amount, deducting intermediate interest, at the risk of the purchaser.

SEWELL, CH. J. : There does not appear to be any intention of usury on either side, yet, the Plaintiff having taken £2. 10s. for the price of his forbearance against the Defendant, is

(1) Cro. Jac., 25.

(2) *Masterman* vs. *Cowrie*, 3, Camp., 488 ; *Hammett* vs. *Yea*, 1 Bos & Pull, 144.

(3) 1 Camp., 445.

(4) *Floyer & Edwards*, Cowp., 115 ; *Parr* vs. *Eleason*, 1 East, 92 ; *Danie & Cartony*, 1 Esp., 274 ; Ellis' *Law of debtor and creditor*, 148.

(5) Vol. 11, p. 269, in note.

not entitled to sue him on this note, for which he has his recourse against the maker, and after failing there, might still have recourse upon Meek, though not by an action of assumpsit. If the Plaintiff is entitled to recover from the Defendant, it is only on proof of damages arising from the failure of the maker, which does not appear. On this ground, but, not on the ground of usury, I think that this action cannot be maintained.

KERR, J. : I am also of opinion that this action cannot be maintained, and agree with the judgment of the court, but, not on the principle upon which it has been rendered. I consider that the contract between the parties was an usurious contract, and if any consideration had been given for forbearance, beyond the legal interest, it was usury : the only mode by which it might have been avoided, would have been by an endorsement " without recourse." In my opinion, this action should be dismissed, on account of its usurious origin. (*Stuart's, Rep.*, p. 456.)

The provincial law against usury is to be found in the ordinance, 17th Geo. III, ch. III, § 5, whereby it is enacted that, " it shall not be lawful, upon " any contract, to take, directly or indirectly, for loan of any monies, wares, " merchandize, or other commodities whatsoever, above the value of six " pounds, for the forbearance of one hundred pounds for a year, and so, after " that rate for a greater or less sum or value, or for a longer or shorter " time ; and the said rate of interest shall be allowed and recovered, in all " cases where it is the agreement of the parties that interest shall be paid ; " and all bonds, contracts and assurances whatsoever, whereupon, or whereby " a greater interest shall be reserved and taken, shall be utterly void ; and " every person who shall, either directly or indirectly, take, accept and re- " ceive a higher rate of interest, shall forfeit and lose, for every such offence, " treble the value of the monies, wares, merchandize and other things, lent or " bargained for ; to be recovered by action of debt in any of the Courts of " Common Pleas in this province ; a moiety of which forfeiture shall be to His " Majesty, and the other moiety to him or them, that will sue for the same." It will be seen that the terms of this ordinance are the same as the statute, 12 Anne, St. 2, ch. XVI, and the whole body of the decisions of the English courts upon this latter statute serve to guide us in the construction to be given to the above ordinance.

Cette ordonnance, 17 Geo. III, ch. III, n'est plus en force.

Les sec. 1, 2, 9, 10 et 11 du ch. CXXVII des *Statuts revisés du C.* de 1886, *l'acte concernant l'intérêt*, sont en ces termes :

" 1. Sauf s'il est autrement prescrit par le présent acte ou par tout autre acte du parlement du Canada, toute personne pourra stipuler, donner et exiger sur tout contrat ou convention quelconque, le taux d'intérêt ou d'escompte qui sera arrêté d'un commun d'accord. S. R. C., ch. LVIII, art. 3. 38 Vict., ch. XVIII, art. 1.

" 2. Le taux de l'intérêt sera de six pour cent par année, si l'intérêt est payable soit par la convention des parties, soit en vertu de la loi, et qu'aucun taux n'aura été fixé par les parties ou par la loi. S. R. C., ch LVIII, art. 8 ; 36 Vict., ch. LXXI, art. 1.

" 9. Les deux articles qui suivent s'appliquent aux provinces d'Ontario et de Québec.

" 10. Sauf s'il est autrement prescrit par le présent acte, ou par tout autre acte ou loi, nulle compagnie, corporation ou association de personnes, n'étant pas une banque, autorisée par la loi, avant le seize août, mil huit cent cinquante huit, à prêter ou à emprunter de l'argent, ne prendra, directement ou in-

directement, sur contrat pour prêt d'argent, de marchandises ou autres effets quelconques, plus de six piastres pour cent piastres par année, et au même taux pour une plus grande ou moindre somme ou valeur, ou pour une plus longue ou plus courte période.

" 2. Néanmoins toute compagnie d'assurance légalement constituée par acte de la législature de la ci-devant province du Canada, ou de l'une ou l'autre des ci-devant provinces du Haut ou du Bas-Canada, ou par une charte de Sa Majesté, ou par un acte du parlement du Royaume-Uni ; et toute corporation constituée pour des fins religieuses, charitables ou d'éducation, dans les provinces d'Ontario ou de Québec, autorisées par la loi à prêter ou à emprunter de l'argent, pourront stipuler, exiger et accorder, dans tout contrat ou convention quelconque, tout taux d'intérêt ou d'escompte qui sera convenu et arrêté, n'excédant pas huit pour cent par année. S. R. C., ch. LVIII, art. 6 et 9 partie ; S. R. H.-C., ch. XLIII, art. 4 partie ; 23 Vict. (Can.), ch. XXXIV, art. 1 ; 36 Vict., ch. LXX, art. 1.

" 11. Tous billets, obligations, lettres de changes, contrats et assurances quelconques faits ou consentis en violation des dispositions de l'article qui précède sur lesquels ou par lesquels un plus fort intérêt que celui permis par le present acte ou tout autre acte de la loi est pris et retenu seront nuls, et chaque corporation, compagnie et association de personnes, n'étant pas une banque autorisée a prêter et à emprunter de l'argent comme susdit, qui directement ou indirectement, prendra, acceptera et recevra un taux d'intérêt plus élevé, encourra une amende du triple de la valeur des deniers, marchandises ou autres effets prêtés et stipulés. Cette amende pourra être recouvrée au moyen d'une action intentée devant toute cour de juridiction compétente ; et la moitié de cette amende appartiendra à Sa Majesté pour les besoins publics du Canada, et l'autre moitié à la personne qui en fera la poursuite. S. R. C., ch. LVIII, art. 9 partie ; S. R. H.-C., ch. XLIII, art. 4 partie.

Les sec. 80 et 81 du ch. XXXI des S. du C. de 1890, 53 Vict., *l'acte des banques*, sont en ces termes :

80. " La banque ne sera passible d'aucune pénalité, ni amende pour raison d'usure ; et elle pourra stipuler, prendre, réserver ou exiger tout taux d'intérêt ou d'escompte n'excédant pas sept pour cent par année, et pourra recevoir et prendre tout tel taux d'avance, mais elle ne pourra pas recouvrer de taux d'intérêt plus élevé ; et la banque pourra payer tout taux d'intérêt quelconque sur les deniers qui y seront déposés.

81. " Aucun billet à ordre ou au porteur, lettre de change ou autre effet négociable, escompté par la banque, ou endossé ou autrement transféré à la banque, ne sera tenu pour nul, usuraire ou entaché d'usure, quant à cette banque, ou au souscripteur, tireur, accepteur, endosseur ou bénéficiaire par endossement, ou autre partie à cet effet, ou au porteur *bona fide* de cet effet, et nulle partie à cet effet ne sera sujette à aucune pénalité ou amende, à raison d'aucun taux d'intérêt pris, stipulé ou reçu par la banque, sur ou à l'égard de ce billet, lettre de change ou autre effet négociable ou payé ou consenti par toute partie au dit effet à une autre, en compensation ou en considération du taux d'intérêt exigé ou devant être exigé par cette banque ; mais nulle partie à cet effet, autre que la banque, ne pourra recouvrer, ni ne sera tenue de payer plus que le taux d'intérêt legal dans la province où la poursuite sera intentée, et la banque ne pourra, non plus, recouvrer un taux d'intérêt excédant sept pour cent par année ; et nul porteur ou partie à un billet, lettre de change ou autre effet négociable, agissant de bonne foi ne sera en aucun cas privé d'aucun recours contre toute partie au dit effet, ni passible d'aucune pénalité ni amende, pour raison d'usure ou de contravention aux lois d'aucune province concernant l'intérêt, commise à l'égard de ce billet, lettre de change ou effet negociable sans la complicité ou le consentement du porteur ou de la partie de bonne foi.

Par le § 3 de la sec. 30 du ch. XXXIII des S. du C. de 1890, 53 Vict., il est décrété que :

" Nulle lettre de change, bien que donnée pour une cause usuraire ou à la suite d'un contrat usuraire, n'est nulle entre les mains d'un détenteur, à moins que ce détenteur n'eût, lorsqu'elle lui a été tranférée, connaissance réelle qu'elle avait été donnée à l'origine pour une cause usuraire ou à la suite d'un contrat usuraire."

CONTRAINTE PAR CORPS.—MARRIED WOMAN.

COURT OF APPEALS, Quebec, 25th July, 1831.

On appeal from Montreal.

WILLIAM SCOTT et ux., Appellants, and JOHN PRINCE, Respondent.

Held: That a *contrainte par corps*, against a married woman, upon a judgment for principal, interest and costs, cannot be obtained. (1)

In the month of June, 1822, the Respondent recovered a judgment, against the Appellants, jointly and severally, with three other persons, for damages, in an action for an assault and battery. This judgment was reversed in appeal, so far as respected William Scott, one of the Appellants. On the first day of May, 1824, a writ of *fieri facias* was issued, against the goods and chattels of Catharine Ferguson, one of the appellants, to which the sheriff made his return, on the 14th day of July following, that he could not execute the same, as the door of the Appellants' domicile was fastened, and he could not obtain admittance, after a demand made upon a grown person in the said domicile. On the 15th day of June, 1829, a service, by one of the bailiffs of the Court of King's Bench, at Montreal, of the judgment above mentioned, and a demand of payment of the same was made, on Catharine Ferguson, and, at the same time, she was notified that, to the payment of the said judgment, and costs, she would be constrained by all lawful ways, even by imprisonment of her body, *après quatre mois*. On the 15th February, 1830, a rule was granted, by the court below, at the instance of the Respondent, ordering that a *capias ad satisfaciendum*, or *contrainte par corps*, should issue, at the expiration of fifteen days, to take and detain the body of the said Catharine Ferguson, in satisfaction of the said judgment. On the 19th of February, the court pronounced its judgment, upon the above rule, wherein, after stating the demand above mentioned, and the return of the bailiff, that he had declared to her that she would be constrained by her body, *contrainte par corps*, etc., it was adjudged, "that the said Catharine Ferguson should, within fifteen days from the service of the present judgment, be attached, by her body, to pay to the Plaintiff the said sum, etc." From this judgment, the present appeal was instituted.

SEWELL, CH. J.: By the ancien laws of France, the *contrainte par corps* was allowed in every case of debt, and this continued to be the rule until the year 1254, when it was abrogated by the ordinance of St. Louis, except as to debts

(1) V. art. 2272, 2273 et 2276 C. C., V. aussi *Georyen* vs. *McCarthy*, ante, p. 135,

due to the Crown. The *Ordonnance de Moulins* restored the ancient law, but exempted women and men of seventy years of age from its operation. (1) The Code Civil, in 1667, in its turn, abolished the general provisions of the *Ordonnance de Moulins*, but continued the exemption, in behalf of women and *septuagénaires*, (2) and confined the *contrainte par corps* to the several cases which it specially enumerates, among which are judgments for costs, *restitutions des fruits*, and *dommages et intérêts* exceeding two hundred livres. The redaction of the *Code Civil* adapted the provisions of that statute to the state of Canada, and provided that the infliction of the *contrainte par corps* should be left to the discretion of the judges, and such was the law at the time of the conquest. The statute, 14th Geo. III, ch. LXXXIII, followed that event, and the first and second of the ordinances, which were enacted by the legislative council of Quebec, established the courts by which justice was, in future, to be administered, and the course of proceeding which they were to observe. In these, the several instances where the *contrainte par corps* should, after judgment, be permitted, were for the security of the subject, particularly declared, and the dangerous power of imprisonment at discretion, which the redaction of the Code had reserved to the courts of the province, under the government of France, was thus abrogated. But, independent of what has been said, we are of opinion that women, other than *marchandes publiques*, even in France, were not subject to the *contrainte par corps, après les quatre mois*, for costs. *Quacumque via data*, the judgment of the court below must be reversed. (3) (*Stuart's Rep.*, p. 467.)

(1) 3 Fèvre de la Planche, *Tr. du dom.*, 296, 298.

(2) Tit. XXXIV, art. 8; Serp., 659 *et seq.*

(3) WOODINGTON *vs.* TAYLOR: The allowance of the *contrainte par corps après les quatre mois*, is descretionary with the court. This action was dismissed and the Defendant, upon the authority of the 2d article of the 34th title of the *Code Civil*, moved for a *contrainte par corps* against the Plaintiff, for the amount of his taxed costs "après les quatre mois." PER CURIAM: The *contrainte par corps* was originally established by the 48th article of the ordinance *de Moulins*, in all pecuniary cases. 1 *Neron*, 470; but was abolished by the *Code Civil, art.* 1, 2, 3, *tit.* XXXIV, except in cases of judgment for costs exceeding 200 livres, and of judgments against tutors, for principal or costs. The latter exception is not the present case, the former is. But the provincial *rédaction* of the Code Civil provides that the allowance of the *contrainte par corps* shall, in such cases, be in the direction of the court, 1 *Edits et Ordon.*, 223, and a case must, therefore, be shewn to the court, whenever this extraordinary remedy is asked. No such case is here exhibited, and the Plaintiff's demand was fairly and properly made. *Serpillon*, 650; *Ib.*, 653; 1 *Sallé*, 540; *Rodier*, 676; 3 *Fèvre de la Planche*, 296, 297. This renders it unnecessary for us to enquire into the effect of the ordinance, 25th Geo. III, ch. II, upon the 34th title of the Code Civil, and we give no opinion on this point. The Defendant takes nothing by this motion. *Vide* B. R. Q., *Leddy* vs. *McPharlane*, n° 1365, in the year 1829; also *Dearness* vs. *Staller*, in the year 1834, n° 996; B. R Q., 1829, n° 1157, *Bedard* vs. *Hardy*.

PROCEDURE.—ACTION TO ACCOUNT.

COURT OF APPEALS, Quebec, 19th November, 1831.

On appeal from Montreal.

WILLIAM SMITH PLENDERLEATH et ux., Appellants; and WILLIAM MCGILLIVRAY and others, Respondents.

Held : That an interlocutory judgment, adopting, without opposition, the account of a succession prepared by its order, passes *in rem judicatam*, and it is not competent to the representatives of a minor, who was legally a party to the suit, to revive the proceedings, and contest any particular item in the account. The court, however, may rectify any error of calculation. (1)

Simon McTavish, who had entablished an extensive trading and commercial house, at Montreal, known by the name of the North West Company, made his will, by which he bequeathed legacies to his relatives and friends, in amount exceeding £100,000, and he died in the year 1804. Amongst these, he gave £20,000 to his son, William, which sum is the subject matter to which this enquiry relates. He appointed his nephew and partner, Wm McGillivray, with Isaac Todd and James Reid, together with other gentlemen who did not act, as executors of his last will and testament. He declared it to be his "will and desire, that none of the foregoing " legacies, exceeding one hundred guineas, should be paid out " of his estate, until seven years, at least, after his decease, " unless sufficient monies for that purpose should have been " realized therefrom, without loss or inconvenience to the " concern, or concerns in which he was then a partner." Matters remained in this state, till October, 1811, when the seven years had elapsed, at which time, the Plaintiff, George Selby, a legatee for £200, brought his action, against the executors, to enforce the payment of his legacy. In this action, the Defendants fyled a plea, in which they admitted that they had assumed the execution of the testator's will, and that estates, monies and credits had come into their hands, to the amount of £95,420 1s. 10d., out of which they had paid £34,660 8s. 7d., leaving a balance of £60,759. 13s. 3d., for which they were accountable. Accounts of credits and debits were then fyled, but they alleged that the Plaintiff must submit to a diminution of his legacy, for want of sufficient assets to pay all the legacies. The court below, in this stage of the cause, pronounced an order calling upon persons interested in the estate and succession to come forward with their

(1) V. art. 530 C. P. C.

claims, and the legatees and others concerned in the same, in obedience to this order, fyled their interventions, and thus became parties in the cause; William McTavish, then a minor, was represented by Henry McKenzie, in his character of tutor duly appointed. The court, on the 18th June, 1814, pronounced an interlocutor, whereby they appointed a "*commissaire* or *examiner*, to enquire and report upon the state "of the effects, and estate of what nature soever of the said "deceased, which were at the time of his decease and since." And, in order to enable him to lay before the court such information as would put it in their power to carry into effect, as far as possible, the intention of the testator, and to do justice to all parties, very full instructions were embodied in the interlocutory judgment. The examiner thus named, fyled his report, on the 11th October, 1815, in which he states, that, after examination of the accounts of McTavish, McGillivray & Co., and by "*access to their books and papers*," the balance due by the house to the testator's estate, was, on the first of that month, £53,493 3s. 10½d., in which sum is comprised interest from 6th July, 1811, the date of the account current, to the 1st October, 1815, upon the sum of £60,750 13s. 3d. Thus, this latter sum was reported to be *nominally* in the hands of the executors, at that period, though it was not in their *actual* possession. On the 20th October, 1815, the court below pronounced a judgment adopting the examiner's report, and declaring, as the reason for such adoption, "that "no objections to the said report had been made, or taken, "by any of the parties to the suit." In the same judgment, they prescribe the course to be followed, in order to carry the testator's intention into effect, as far as was practicable.

In the year 1818, William McTavish, the residuary legatee, died, and his mother, one of the Appellants, inherited his personal estate. The Appellants, having become invested with the rights of the residuary legatee, with a view of contesting the accounts of the executors' administration, revived his intervention, by permission of the court, on the 11th October, 1822, and, by a supplementary demand (*nouvelles conclusions*), among other things, alleged, "that they had a right to take such conclusions as the said McTavish might have done, and to contest the account rendered by the executors, in October, 1811, as well as a supplementary account which they had fyled on the 13th October, 1820, of their administration, during the period which had elapsed, since October, 1815. That, since the testator's death, the house of McTavish, Frobisher & Company, allowed to the executors, which they had received, interest on the money belonging to the testator, in their hands, and, on balancing the account current, every

year, on the 30th November, debited themselves with the interest accrued during the preceding year, which was, each year, added to the capital then in their hands, and interests on the whole allowed for the following. That, from July, 1811, to October, 1815, the executors had received, as interest, £17,434 4s. 4d., and that they had accounted only for £9,546 17s. 4½d. That, from October, 1815, to October, 1820, they had received upwards of £6000 for interest, which also they had not accounted for in their supplementary account. So that in respect of interest alone, the executors ought to have accounted for £16,447 11s. in addition to the sums for which they had accounted. In conclusion, the Appellants demanded the sum of £10,000, with interest, from 1st October, 1820, to be paid to them as residuary legatees after payment of all the other legacies." The Respondents, in answer to this demand, pleaded that the proceedings of the court, as above detailed, constituted a *res judicata*, and a bar to these *nouvelles conclusions*; 2. The general issue. The Appellants, in answer to the *exceptio rei judicatæ* replied that the judgment of the 20th October, 1815, was rendered *ex parte:* that William McTavish was injured thereby, *lésé*, and, consequently, it was null and void; and that, as soon as he became of age, he was entitled to have the judgment set aside. The court below rendered its judgment, wherein the demand for compound interest was dismissed.

KERR, J.: We are called upon to review and correct a judgment rendered in the Court of King's Bench, at Montreal, in this cause, which involves interests of great magnitude to the parties concerned.

In the opinion of this court, the whole merits of the case depend upon the effect of the judgment of the 20th October, 1815, and the question is whether, as respects the succession of William McTavish who came of age in 1817, and died the subsequent year, the claim of compound interest, on those monies set up by the Appellants in their *reprise d'instance*, has not, by that judgment, passed *in rem judicatam?* The authorities cited by the Respondent's counsel shew, that, though a minor at the time the judgment was rendered, being represented by his tutor, he is as much bound by it, as if he had been of full age, and the only course by which he can be relieved, if injured, is by a proceeding for restitution *in integrum*, on the *requête civile* (a proceeding which does not obtain in Canada), (1) or by appeal. (2) But, it has been contended that the judgment of 20th October, 1815, is only an

(1) V. art. 505 C. P. C.

(2) 2 Poth., *Tr. des Obl.*, 443; Poth., *Pro.*, 148; 1 Pig., 557, 564, 566.

interlocutory decree, and that the Appellants had a right to open up all discussion which might have been competent to them previous to rendering of that judgment, so as to have the alleged error corrected or annulled. Now, if all sentences which may be rendered between the commencement and conclusion of a suit, are to be considered as not definitive, the Appellants' counsel would be quite right in the position they have maintained. But there are, according to *Voet*, interlocutory decrees which have all the effect of definitive judgments, and can only, if wrong, be remedied by appeal. "Dividitur sententia," he says, "in interlocutoriam et definitivam. Interlocutoria est pronunciatio aliqua de plano, super incidenti aliquo in principio, vel medio litis facta, causam principalem non plene determinans," and, then, he goes on to say, "Non desunt, tamen, interlocutoriæ sententiæ, quæ vim definitivæ habent, dum irreparabile damnum infert earum executio, vel definitiva, ex juris necessitate, ad eas sequi debet." He proceeds to illustrate the proposition by examples, and, amongst others, we find the following: "Aut judex deferat actori vel reo jusjurandum, tanquam in causâ dubiâ, ut secundum eum, qui juravit judicetur." The learned jurist, then, concludes the *sommaire*, "Quales interlocutorias vim difinitivæ habentes, etiam. post pronunciationem, corrigi vel retractari non posse, verius est, maxime, si ab iis appellatum fuerit." (1)

Though it is a positive injunction in the Code Civil "qu'il ne sera ci-après procédé à la revision d'aucun jugement rendu sur la clôture de compte." yet, if the omission in the accounts, by not adding compound interests, were really an arithmetical mistake, a mere error in calculation, then indeed it would have been competent for the court below, under the authority of the note of the 21st article of the 29th title of the Code Civil to correct the error, for, it is there said, "si l'erreur de calcul avait été commise en la sentence, elle pourrait être corrigée, sans qu'il fût necessaire d'en interjeter appel." This course of practice was taken from the Roman law, and it is, there, said, "quoniam error computationis appellare non necesse est, et citra provocationem corrigitur." But, if it were permitted to the court below to enter into an enquiry, whether the *compound* interest should be substituted and awarded, instead of *simple* interest, it would virtually tend to admit their power to correct and amend their former definitive decree, and, thus, by changing the principle of the former judgment, materially affect the interests, not only of the executors, but of all the legatees and annuitants, under

(1) Voet, *ad Pandectas*, lib. XLII, tit. I, § 4: *De re judicata, etc.*

the will. The court below, indeed, did entertain an opinion that they might revise and correct their interlocutory judgment of the 20th October, 1815, for they permitted the Appellants, no less than four years after the death of William McTavish, to fyle their conclusions impeaching the interlocutory judgment. But, on the 20th October, 1826, eleven years afterwards, they adhered to their first judgment, and dismissed the Appellants' conclusions, so far as respects the claim of compound interest. This court cannot but admit the principle contended for, that the Appellants took up the reprise d'instance, in the precise state and condition in which it stood at the death of William McTavish, and how did it then stand? A judgment had been rendered, which, in so far as regards William McTavish, whom they represent, definitively established the balance due by the executors to the succession, on the 20th October, 1815, and shall the Appellants, on whom, in the terms of English lawyers, "a descent has been cast," and who waited five years after the minor's death before calling in question the legality of that judgment, be placed in a more favored situation than he? It cannot escape our attention that the Appellants, though they claimed, en autre droit, were parties to the judgment of the 20th October, 1815, and, by their silence, consented to it, for it is a maxim of law, *qui tacet, consentire videtur.* They must be presumed to have then been cognizant of the principle established in the report of allowing simple interest, instead of compound interest, and, having allowed so many years to elapse, both before and since the death of William McTavish, without attempting to be relieved from the alleged error, they cannot otherwise be deemed but impliedly to have acquiesced in that judgment.

It is proper to mention that His Excellency lord Aylmer, has taken a view of this cause which I think perfectly correct, namely, that no such evidence has been given of the house of McTavish, McGillivray & Co., allowing compound interest on such sums as may have remained in their hands, so as to remove all doubts on this point, and, considering that the intention of the testator, as manifested in his will, was to maintain the credit of the house, and to grant them indulgence, we think, in adjusting our opinion on this matter, that the Respondents are clearly entitled to avail themselves of this favorable disposition of the testator towards the house. On the whole, this court (one of the judges dissenting), is of opinion that the judgment of the court below ought not to be disturbed.

Judgment affirmed. (*Stuart's Rep.*, p. 470.)

LEGISLATIVE COUNCIL.—PRIVILEGE.

COURT OF APPEALS, Quebec, 9th February, 1832.

In the case of DANIEL TRACEY.

Held: That the legislative council has a right to commit, as for breach of privilege, in cases of libel, and the court will not notice any defect in the warrant of commitment for such an offence, after conviction. (1)

On the 8th day of February, 1832, a motion was made for a habeas corpus, directed to the keeper of the common gaol of the district of Quebec, or his deputy, to produce the body of Daniel Tracey in his custody, together with the day and cause of his detention. The motion being grounded on an affidavit, which was read, the court granted the motion. On the following day, the prisoner was brought up and a return made by the gaoler, "That the body of the said Daniel Tracey had been committed to the common gaol of the said district, by virtue of a warrant from under the hand of William Smith, clerk of the legislative council, in the words following, to wit:

LEGISLATIVE COUNCIL, *Tuesday*, 17*th January*, 1832.

"*Resolved*, That Daniel Tracey, of Montreal, having presumed to publish a libel against this house, in the paper intituled, "The Vindicator," of Tuesday evening, the 3rd instant, vol. III, n° 53, published in Montreal, is guily of a high breach of the privileges of this house.

"*Resolved*, That Daniel Tracey be, for his said offence committed prisoner to the common gaol of the district of Quebec, for and during the present session of the Provincial Parliament.

"*Resolved*, That the serjeant at arms, attending this house, do forthwith convey the body of the said Daniel Tracey to the common gaol of the district of Quebec, there to be kept in safe custody, for and during the present session of the Provincial Parliament.

"*Attest.* WILLIAM SMITH, clerk of the legislative council.

"*To* WILLIAM GINGER, serjeant at arms, attending this house, and to the keeper of the common gaol of this district."

A. STUART argued, in support of the motion: This return brings under the consideration of the court one main abstract question of law, whether the legislative council can, by law, commit for contempt, in the case of an alleged libel. But, before proceeding to the consideration of this question, there are, upon the face of the conviction and commitment, which

(1) V. la cause de *Bedard*, ante, p. 102, et les art. 124 à 135 inclusivement des *Statuts refondus de Québec.*

are the cause for the detention of the parties assigned in the return, other objections, which, though certainly of minor importance, when compared with this main and principal question, yet objections which could not be passed over in silence. Granting hypothetically, for the moment, that the council has the power to commit for contempt, the conviction must be examined with reference to the same rules of law which govern other convictions in courts of law. Now, there are various fatal irregularities upon the face of the conviction in question. 1. It does not appear that the party convicted had notice of the complaint, and has been brought before the council, by attachment or otherwise. 2. It does not appear that any opportunity has been afforded to the Defendant to answer the charge, or that, in point of fact, any answer has been asked or given to such charge. 3. It does not appear that he was present, when the conviction was made. 4. That the first proceeding, on the part of the council, as against the Defendant, is the commitment in execution, and that no precedents could be offered in support of such a proceeding. Even, if the council should be held not to be bound down to the strict technicalities required in other convictions, and, though it should be said, as was intimated by lord *Ellenborough*, in the case of Sir *Francis Burdett*, that it was not necessary that a conviction for a contempt, by one of the branches of the legislature, should be drawn up "in a workman-like manner," still, it could not be thence inferred that the essentials of judicial order could lawfully be passed over by them. No human tribunal has the right to convict without hearing the party accused, or giving him an opportunity of being heard in his defence. It is unnecessary to urge here, that it would not be competent to aid this substantial irregularity in the conviction, by matter *dehors* it; nor indeed has any attempt been made to do so. No precedents can be offered in support of such a conviction, but, there is one in point against it, the case of *Perry*, editor of the *Morning Chronicle*, who was committed, on the 22nd of March, 1798, for a contempt against the house of lords, in publishing a libel in his paper against that body. The commitment is as follows: "*Die* " *Jovis*, 22° *Martii*, 1798. The gentleman usher of the black " rod acquainted the house that James Perry had surrendered " himself and was in custody. Whereupon, he was ordered to " be brought to the bar, and, being brought to the bar, accordingly, and heard as to what he had to say, in answer to the " complaint made against him of having published a libel " upon this house, in the paper intituled, *The Morning Chronicle*, Monday, March, 19th, 1798, and, having acknowledged " himself to be the proprietor of the said *Morning Chronicle*, " he was directed to withdraw.

"*Resolved*, By the lords spiritual and temporal in parlia-
"ment assembled, that James Perry, having presumed to
"publish a libel on this house in *The Morning Chronicle*,
"Monday, March 19th, 1798, is guilty of a high breach of the
"privileges of this house.

"*Ordered*, By the lords spiritual and temporal in parlia-
"ment assembled, that James Perry do, for his said offence,
"pay *a fine to His Majesty of fifty pounds*; and that he be
"*committed prisoner to Newgate, for the space of three*
"*months, and until he pay the said fine*; and that the
"gentleman usher of the black rod attending this house, his
"deputy or deputies, do forthwith convey the body of the
"said James Perry to the prison of Newgate, to be kept in
"safe custody, for the space of three months, and until he
"pay the said fine." (George Rose, cler. parliament.)

What is somewhat extraordinary, the framers of the commitment in question here, seem to have had these proceedings under their eye, and have, noswithstanding, deviated from this form in the essential particulars above adverted to. If, then, the legislative council had legally cognizance of the alleged offences, it has been shewn, it is apprehended, that the proceedings, by and before them, have been so irregular, as to render their adjudication merely null. But the jurisdiction of the legislative council, over offences of this nature, is respectfully denied, and, if it can be proved that the law does not give to the council any such power, then, the proceedings had in the premises by them, are *vox, et præterea nihil*: the conviction then would bear the outward form and semblance of authority only. It would be a mere shadow, without any substance: and the party here would be entitled to his discharge, under the writ of *habeas corpus*, as being under duress of imprisonment, without legal authority: and the question, as to the jurisdiction of the legislative council in this matter, would come directly before the court, who would be called upon to determine upon the same. The objection here goos to the very root of the tree, and, the conviction being held void, the commitment founded upon that pretended conviction falls to the ground, as of course. It has been sometimes argued that, there being a conviction, and a commitment under it, the court is bound, at all events, to remand, but this is a manifest error, the rule applies only to commitments *by competent authority*. In this last case, it is admitted generally, but not universally, that the court could not, upon the return to a writ of *habeas corpus*, assigning, as the cause of detention, a conviction, enquire into the grounds or reasons of that conviction. These, it is sufficiently obvious, could only be gone into, either upon an appeal, or upon a writ of *certiorari*, or upon a writ of error, ac-

cording as the law gave one or more of these remedies to the party alleging that he had been aggrieved by the conviction. The reason of this is, that the judgment, being a judgment of a court, upon which the law had conferred jurisdiction over the subject matter, that judgment, generally speaking, could not be disturbed by any incidental course of proceeding; but must remain in full force and effect, until it should have been reversed, vacated, or set aside, by direct proceeding had for this purpose before the competent legal tribunals, and in the forms prescribed by the law. But these reasons militate directly against the assumption that a pretended conviction, by persons exercising an authority which has not been conferred upon them by the law, shall be esteemed final and conclusive, by the living organs of the law: or, that they shall give any effect either actively or passively to an usurped authority. There is no halfway house. the power exercised is either exercised with the sanction of the law, or without that sanction; and, in the last case, it is exercised against the law and cannot, in any form or way, be countenanced by the law which it violates. It is a contradiction in terms to suppose that the law would lend its aid in support of an usurped authority. It has often been said that there could be no injury without a remedy, the quiescence of the law in the case of usurped powers, and its wilfully shutting its eyes to such usurpation of power would be a tacit co-operation and alliance of the law, with the subverters of the law, and would leave the subject to suffer from illegal acts, without affording him any remedy, which would be contrary to this rule. And the true legal remedy, in a case like the present, is by the prerogative writ of *habeas corpus* which has here been brought. This doctrine is supported by the opinion of lord chief justice *Wilmot*. (1) It is not intended to be denied however, that, if the legislative council had jurisdiction over the offence of libel, and, if they had proceeded in due judicial order, though summarily, to hear, try and determine this matter, the grounds of their conviction are not examinable

(1) The nature of this writ must first be considered: It is a demand, by the King's supreme court of justice, to produce a person under confinement, and to signify the reason of his confinement. In imprisonment for criminal offences, the court can act upon it, only in one of these three manners: 1. If it appears clearly that the fact for which the party is committed, is no crime; or that it is a crime, *but he is committed for it by a person who has no jurisdiction, the court discharges*. 2. If doubtful whether a crime or not, or whether the party be committed *by a competent jurisdiction*; or it appears to be a crime, but a bailable one, the court bails him. 3. If an offence not bailable, and committed by a competent jurisdiction, the court remands or commits. The nature and quality of the act with which the party is charged, and *the jurisdiction which has taken cognizance of it*, are to be considered in the return. *Wilmot's Decisions*, 107.

here. Upon a point so clear as the present one, it might not perhaps be thought necessary to offer any authority, but misconceptions have obtained, which it is material to rectify; this is one of the disadvantages which counsel is subject to when obliged to argue a case, without counsel appearing on the other side, who might have relieved him from going into this part of the subject, by at once admitting the principle of law as stated. This consideration in truth gives the vast importance which belongs to the main and general question; for, if it be held that the legislative council has jurisdiction over libel at all, then, their power, in relation thereto, would be a power without any control whatever. In referring to the opinions and arguments of that eminent lawyer, the late Mr. Hargrave, I refer to the opinions of a man who would be as little biassed by any utopian notions of perfection, as by any radical prejudices. Consulted, in the case of the commitment of the honorable *Simon Butler*, and Mr. *Oliver Bond*, by the Irish house of lords, in 1793, for contempt and breach of privilege, by what they adjudged to be a libel on that body, he says, "considered according to the general turn and genius "of the law of England, the legality of the imprisonment and "fine in question, could not, I conceive, be supported; because, "by the general rule of our law, an accused person can nei-"ther be put on trial for a crime, without the presentment of "a jury, nor, in case of a denial of a crime, be tried for it, "without a jury of his peers, nor, in a criminal trial, be "himself interrogated; and, in every one of these points, the "present case seems a deviation." And, he goes on to point out some exceptions to this general rule, as in the cases of information, *ex officio*, for misdemeanors, contempts against the courts of Westminster Hall, summary criminal jurisdiction given to justices of the peace by statute, criminal jurisdiction exercised in certain cases in the ecclesiastical courts, etc. And, again, being consulted in 1798, in the case of Perry, whose commitment has already been referred to, he says, "proceed-"ings in either house of parliament, for contempt and breach "of privilege, more especially where, as in the present case, "the charge is for a libel, are, in their nature, very con-"trariant to the ordinary rules and course of administering "justice in England. The offended parties act as judges. The "court is not an open one. The witnesses against the accused "party are originally examined in his absence. The accused "party is called upon to defend himself, without the oppor-"tunity of cross-examining the witnesses against him. He is "not, in general, allowed to have the benefit of counsel. He "is, in some degree, interrogated against himself. He loses "the benefit of trial by jury; and, if the imputation is for a

" contempt against the house of lords, and the accused is a " commoner, he is tried, not by persons of his own order, but " by those of a distinct and a higher one. The judgment is " said to be, not only unappealable, but wholly unaxaminable, " except by those who pronounce it. All this variety of " hardship, upon the party accused, I understand to be, at " least, incident to the ordinary proceeding for contempt " against either house of parliament. But, if the contempt be " publishing a libel, which is the case now before me, there is " a still further hardship: for, in the first instance, and before " hearing of the accused party, it is sometimes adjudged, as it " appears to have been in the present case, that the offence " has been committed; and, so it is only left to the accused " to controvert his having committed it. This seems a very " severe deviation from the common course of criminal justice. " Surely, it is essential to the defence of the party accused, " that he should have the opportunity of shewing, not only " that the fact charged was not done by him, but that such " fact is not an offence; and, denying the latter to him " appears like adjudging one half of the case without a " hearing." In the former of these cases, he says further, " that, though, in a criminal case, the accused party may have " been examined on oath, may have been tried, on informa- " tion only, or may have been adjudged, without a trial by " his peers, it is not of necessary consequence, that the pro- " ceeding should be illegal. To decide that point, it should be " previously considered, whether the case falls not within " some special rule or course of proceeding. The *onus*, indeed, " of taking the case out of the general rule falls upon those " who claim benefit of the exemption. But, if they succeed in " the proofs, it is a vain objection, in point of law, to say, " that the general principles of the law and constitution are " to the contrary. If the exception is established, whether it " be a reasonable exception, or not, it ought to prevail, until " revoked by legislative, or other competent authority. In the " present case, therefore, I conceive the true question to be " whether the case is, or is not, one of the cases excepted from " the ordinary course of criminal prosecution." As, in Great Britain and Ireland, the power to convict and punish for a libel, by either house of parliament, as for a contempt against one or other of those bodies, could only be maintained by shewing that it was supported by law as an exception to the general rule, so, also, in Lower Canada, where the English criminal law obtains, the power of the legislative council to convict and punish for a libel could only be maintained by, in like manner, establishing, on sufficient legal grounds, the exception to the general rule, which, as a general rule, stands

admitted by all. Now, at the very threshold, we are struck with a marked difference between the two English houses of parliament and our own. The origin of the powers of the English houses of parliament goes back to a very remote antiquity, they, at one time, formed a part of the *Aula Regis*, and claimed to have all those judicial powers which had not been transferred to the King's courts, after the breaking up of the *Aula Regis*. The house of lords has long exercised, and, now, exercises, the highest judicial powers of the state. The contest between the two houses, upon this head, may be seen in the case of *Fitton & Carr*, in 1667, and, after the restoration, in the case of *Skinner & the East India Company*, in the case of Sir *Samuel Barnardiston*, and in the case of *Bridgman & Holt*, in the Common Pleas, and of *Shirley & Fagg*, with which last case the controversy ended. There is also the notorious *Aylesbury* case. (1) It does not seem necessary to enter into the detail of any of these cases. They are referred to, generally, as evincing essential differences between the constitution of the two branches of the British parliament, and the two branches of the provincial legislature, where pretensions so lofty as these were made by both branches of the British legislature, to judicative power, and where, as to one of them, they were, to so large an extent, maintained, that the practice of attaching for contempt by libel, came to be adopted by both houses, and now stands supported by a long usage, recognized by the courts of the kingdom. It rests then, in England, upon the same basis as the powers and the privileges of those bodies, to wit, immemorial usage, and, accordingly, it is upon this footing that *Hargrave* puts it. Thus, he says, " in respect also to both houses, their respective Journals " contain evidence of a continual exercise of judicative power, " in cases of privilege, for more than the last two centuries," and, in no other part of these opinions, does he offer any other ground for the exercise of this anomalous privilege. We come now to the powers exercisable by either branch of the provincial legislature, in relation to matters of contempt generally. The two branches of the provincial legislature are established by the 31st Geo. III, ch. XXXI, commonly called the constitutional act. They have no powers, except those which they derive from that act, either directly or incidentally. They have

(1) The whole learning upon this subject is to found in lord chief justice *Hale's Treatise on the jurisdiction of the Lords' House of Parliament.* In Hargrave's introductory preface thereto. Hargrave's juridical arguments, together with the judgments of the court in Brass *Crosby's* case, 3 Wills., 198. Case of *Benjamin Flower*, printer and publisher of the *Cambridge Intelligencer*," 8 Durnford and East, p. 314, and in that of *Sir Francis Burdett*, reported in the 14th vol. of East's Reports.

never claimed or possessed any judicative power, other than that relating to matters of contempt, and it is as to the limits of this power that we are now called upon to inquire. The words of the act are as follows: "That the legislative council "and assembly, by and with the advice and consent of His "Majesty, shall have power to make laws for the peace, "welfare and good government of the province." It will not be said that the power claimed is given to them directly; they have not, as claimed by the Parliament of Great Britain, any *inherent* powers. They have no immemorial usage to sanction such a pretension. Whatever powers they possess, in relation to matters of contempt, can only be had by them as incidental to the powers given to them by the statute, founded on the well known rule of law, *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.* No doubt can be entertained that, as incidental, to the powers given to those bodies, by the statute, they have the power of committing for any actual obstruction of their proceedings, but this does not extend to the case of libel, Mr. Hargrave seems to have had this distinction present to his mind, in the following passages: "But, though I take a judicative power, in cases of privilege, to be thus fully established *by long use,* in both houses of parliament, in England, yet, as to the extent of such power, and, as to the manner of exerting it, there are difficulties, which might perplex the most conversant in parliamentary law and precedents. So far as this jurisdiction applies to direct and positive infringements of the privilege of parliament, such as hindering or interrupting the two houses, or their members, or assistants, in their functions, whether by arrests, assaults or otherwise, I cannot see the least room for doubting. So far, also, as this judicative power is applied to the writing, speaking or publishing of gross reflections upon the whole parliament, or upon either house, such an extension *though perhaps originally questionable,* seems now of too long a standing, and of too much frequency in the practice to be well controverted; and I am struck in the same way, in respect to other instances of extraordinary latitude, to which both houses have, sometimes, stretched their doctrine of contempts."

And, again, "Upon this review of the course of proceedings for contempts, against the lords or commons, it might perhaps be expected, *that so anomalous a mode of administering* criminal justice should not be extended *beyond the demands of the urgency whence it originates.* But the practice, which hath frequently prevailed in both houses, is not quite consonant to such an expectation. In point of fact, the proceeding has not always been confined to cases of *actual inter-*

ruption of the two houses and their members, in the exercise of their functions. On the contrary, both houses have, occasionally, taken cognizance of libels upon the whole body, and of libels upon individual members, and, sometimes, even of libels upon the King's family and servants; and, under that latitude of construction, have tried and punished offences, over which there could be no doubt of the competency of the ordinary courts of justice to exercise a jurisdiction. Nor, as to themselves, have the two houses always confined the proceeding for contempt to libellous publications reflecting upon their exercise of their legislative or judicial powers, or upon the conduct of individual members in that respect. Sometimes, indeed, these extended constructions of contempt have been loudly complained of, particularly, where the lords, not content with committing for the offence, in which case the imprisonment of course terminates with the session of parliament, have gone the length of fining and of imprisoning for a term certain."

The privilege, in England, having been established in troubled times, the courts of justice seem to have been afraid to risk the consequences which might have followed from a collision between the high courts of judicature and the legislature, and, as they treated a denial of their privileges, as itself, a breach of privilege, the situation of private advocates, even when called upon to give professional advice or assistance, might, where considerable public excitement existed, be somewhat delicate. Some traces of this would probably be found in the following passage from Hargrave: "What is the boundary of the jurisdiction of lords or commons, as to privilege and contempt, and how that jurisdiction, where it really exists, is exercisable, very much depends *on the law and custom of parliament.* Of that law and that custom, the judges have sometimes declined to be the interpreters, even, when called upon by the lords, with whom they are assessors. I feel, therefore, that it might be deemed unbecoming, and, in other respects, might be hazardous in me, professionally to avow more than *doubts upon the law and custom of parliament, against that, which both lords and commons so often, heretofore, and the lords, so recently, have decided by their own conduct.*" True, lord *Ellenborough,* in the case of Sir *Francis Burdett,* considered the power of attaching for contempt by libel, as inherent in the two branches of the British legislature, and he seems, also, to have considered such a power as essential to their protection. This case, it is conceived, is the only case wherein this doctrine is countenanced. With all possible deference to the authority of that case, it does appear that that position might perhaps be questionable, even in En-

gland, but there is no reason whatever to extend such a principle to a colonial legislature. In a state of society such as that of Great Britain, it is necessary that every branch of the public authority should be armed with higher powers than is required in countries circumstanced as these new countries are. So, too, having founded the privilege upon immemorial usage, the question, as to its exact nature, origin and gounds theoretically, comes to be rather a subject of speculative enquiry than of practical utility. So, too, the opinion there must be taken *pro subjecta materia*, and it must not be lost sight of, that Sir *Francis Burdett* was a member of the house of commons, when the offence complained of, was committed; and, as well, the house of commons, as the house of lords, possess a power of discipline, *in foro domestico*. How far that power was abused, upon the occasion of Sir *Francis Burdett*, we are not called upon to investigate. We are then at full liberty here to examine the grounds upon which such a power could be maintained, as incidental to the powers directly given by the statute. In entering into this enquiry, it is proper that I should make this preliminary observation; that, inasmuch as the grounds, and reasons upon which the legislative council proceeded, in declaring the applicant guilty of publishing a libel, are not examinable before this court, it would be travelling out of the record, to enter into the question of libel or no libel. This is mentioned lest silence on this head might be misunderstood as implying any admission of culpability in the party before the court. That question does not here arise. The ground of complaint is that that question has not been brought before the proper tribunal, "a jury of the country," the benefit of which form of trial has been denied. Libel against private individuals, and libel against public bodies, stand upon totally different grounds; the first cannot be too severely repressed; as to the last, care must be taken not to allow to be impaired the public discussion of the public conduct of public bodies. This is essential for the protection of the public liberty: majorities of all public bodies will occasionally, under certain influences of the moment, do acts of injustice, which no one individual of that majority would himself do. The individual responsibility is lost in the crowd: the individual members of the body calumniated, if one will by the agency of the press, suffer not the pain, inconvenience and injury which a private individual would, under similar circumstances, suffer. The legal entity of the whole body is impassible, whether it assails or is assailed, as no one who suffers from it can touch it, so ought it not to have the power of punishing those who animadvert upon its proceedings, by constituting themselves a court of justice, to judge the examiners of their public con-

duct. If you take away the power of this full examination, you destroy the action of public opinion which cannot be brought to bear too strongly upon the proceedings of public bodies; and this power of full examination is taken away, if the public body whose conduct is to be examined, have the power themselves to assign the limits of that examination, and to punish those whom they declare to trespass beyond those limits. So too, where the aspersions are unfounded, their effects must be shortlived, and must themselves soon fall back on the calumniator. Again, the body calumniated or alleged to be so, cannot exercise judicial power with impartiality and competent discretion. In those cases wherein the public opinion is not a sufficient protection for the body accused, or where, from the peculiarly aggravated character of the offence, the offender may be thought liable to condign punishment; his case may safely be left to a jury of his country, in the ordinary forms of judicial trial. No public body was ever injured by the public press. That power, so far as public bodies are concerned, might be compared to steam, which, with a proper use of safety-valves, might be made subservient to the best purposes, and only produces explosion and death by being unduly compressed. Now, all the powers which can by claimed as incidental to the main power given, are such only as are of necessity, without which the main and direct power given, could not be effectually exercised. The press, except where it touches private character, carries along with it the antidote of any poison which it may distil.

KERR, J., here read a passage from *Doctor Johnson's Life of Milton*, wherein he says, "The danger of such unbounded "liberty, and the danger of bounding it, have produce a pro-"blem in the science of government, which human understan-"ding seems hitherto unable to solve. If nothing may be pu-"blished but what civil authority shall have previously ap-"proved, power must always be the standard of truth; if "every dreamer of innovations may propagate his projects, "there can be no settlement; if every murmurer at govern-"ment may diffuse discontent, there can be no peace; and, if "every sceptic in theology may teach his follies, there can be "no religion." It is not surprising that such a doctrine should come from Doctor Johnson. Milton himself stated a very different one, and one much more consonant to the truth. It is to be found in the prose works of that distinguished poet. I cannot pretend to give the words of the original, but the opinion which he there states, in substance is, that if the powers of truth and falsehood were to go forth and grapple on the same arena, no man need fear as to the triumph of the former. The whole burthen then lies upon him who would support the con-

viction in question, to shew that a public legislative body cannot fully exercise its legislative functions, if it be subjected to libellous attacks in print, and that these constitute such an actual obstruction to their proceedings as to prevent them from discharging their legislative duties. Neither branch of the provincial legislature requires this species of protection. It would not be contended that individuals animadverting upon the public conduct of public bodies, and doing so truly, ought to be punished : and, where the aspersions are false and unfounded, they might safely be left to the good sense of the community. Generally, the legislative and judicial functions ought to be kept apart. These powers are entirely distinct and separate in their nature, there is no point of natural relationship between them. If they are made to run side by side, they will not, like the two fabled rivers of antiquity, pursue their steady course without mixing ; and, salutary as they are by themselves, when they do mix, their waters become the waters of bitterness.

If, in any instance, a judicial power, except for state offences on impeachment, could be rightly conferred upon a legislative body, the power in question is the last which should be granted. The essence of the offence for libel lies in the intention. The overt acts which are to constitute this offence cannot be strictly defined. It has been assimilated, and rightly so, in this particular, to the offence of nuisance, the overt acts constituting which offence are equally undefinable. Wherever the question comes to be a question of intention, it is of the last degree of consequence that the persons called upon to judge of such intention should be free from all bias of passion, of feeling even. Where the overt acts constituting the offence are clearly defined by the law, there a man of honor and truth may judge rightly respecting the evidence establishing the offence, even though the accused should be his greatest enemy. Not so where the offence is undefined and undefinable, resting entirely in intention. His wounded self-love, and the natural indignation arising from a supposed insult, are but bad assessors with him in the judgment seat. Again, supposing him to be able to surmount these influences, will the public be satisfied with the sincerity of his judgment ? It is feared not ; and, where this is the case, one of the capital advantages of the institutions for the administration of justice in criminal matters is lost, the confidence of the public impaired and the tranquillity of society jeopardised. Where this has existed the rudest forms of criminal codes, as in the case of the trial by ordeal and by battle, have been sufficient to maintain a tolerable order of things. The passages already given from Hargrave let us sufficiently into his sentiments, as to the propriety of

such a power being vested in a deliberative body. He could not, and ought not to have got over the *ita lex scripta est*, proved by the immemorial possession of them by the house of commons and house of lords. If this had been a case of the first impression there, not so supported, we can entertain little doubt what decision would be come to in the present day. *Junius*, in his 44th number, attacks this practice, and, although the power of committing for libels cannot be denied to the house of commons, yet, it is a power which has been but rarely exercised by that body, for many years past, the commons having adopted the constitutional course of directing the attorney general to prosecute for all public offences. And is it at this time, and under these circumstances, that broken columns of remote and rude antiquity are dug up from the ruins of feudal times, and are transferred as ornaments to the vestibule of the legislative council chamber ? In conclusion, the court will recollect that ours is a written constitution and has not grown up as that of the British island, during a long period of time, gradually adapting itself to the new emergencies arising from the changes in the social condition of the people, and bringing down with much pure gold and with an inextinguishable vitality some of the rubbish of a rude age. And the liberty of free discussion of the public conduct of public bodies is in the present state of things irrepressible, and carrying along with it some slight inconveniences, incident to every thing that is human, a large quantity of positive good purifying, by enlightening, public opinion.

KERR, J. : With every desire to give our judgment on the matters which have arisen out of the return to this writ of habeas corpus, we have considered it our duty to look into the authorities referred to by the Defendants' counsel in his long and able argument. This and our many judicial avocations, during this term, have prevented us hitherto from delivering our opinion on the constitutional question involving the cause of civil liberty, which has been presented to us for our determination. The main question is, whether the legislative council, being a type and similitude of the house of lords, has a right to commit, as for breach of privilege, in cases of libel ? or, in other words, whether the principle on which the imperial parliament rests its rights, powers and privileges can be admitted to apply to the two branches of the provincial legislature ? In regard to the two branches of the imperial parliament, there can be no doubt that the privileges which they now enjoy, and the functions they exercise, were claimed, enjoyed and exercised by them, previously to the separation of the two houses, so early as the close of the reign of Henry III. Their rights and privileges appear to be self-created, and ab-

solute, founded on precedents and immemorial usage ; nor is the exercise of their power to commit for contempts limited to such as are perpetrated in the face of the two houses, but it extends to all acts committed, which in their view, are calculated in any way to impair their dignity, or to restrain the free and independent exercise of their functions. Of this, innumerable precedents are to be found, from the case of *Thrasidas*, in 1529, who was committed by the commons, for a contempt in words, against the dignity of the house, to that of *William Perry*, *Benjamin Flower* and Sir *Francis Burdett*, in our times, who were severally committed, for breaches of privilege in the publication of libels. But, it has been argued by the Defendants' advocate that the legislative council has acquired no such power, by immemorial custom and usage, and that the parliamentary charter of the year 1791 confers no such authority upon it, I certainly admit that this body does not possess, like the house of lords, a right to fine, or imprison beyond the session, nor so extensive privileges as the house of lords and commons possess. But, can the exercise of the power of proceeding summarily, and committing for a libel against the legislative council, as an aggregate body, be refused to them, without their sinking into utter contempt and inefficiency ? A passage from the Pandects has been cited, which I feel myself bound to adopt on this occasion : " *Cui jurisdictio data est, ea quoque commissa videntur, sine quibus jurisdictio explicari non potest.* The legislative council has no judicial powers conferred on it, it is a branch of the legislative government, entrusted with the authority to make " laws for the peace, welfare, and good government of the province." And, whether a political institution is vested with the authority to make laws, or to explain and enforce them, it must, of necessity, possess all the powers requisite to ensure the purposes for which it was created. If the two bodies (for I speak both of the legislative council and assembly) had no authority to commit for written slander, calculated to expose them to public odium or derision, perhaps to intimidate them in the exercise of their important functions, there is no man can doubt but they might be impeded in the performance of the sacred duties which are confided to them, and become less efficient in their endeavours for the public good. It has been urged that the law is quite sufficient to protect them from insults and indignities of this nature, and that all which ought to be conceded to either house, is a right of punishing by imprisonment for insults, outrages, and interruptions committed in the face of the house. But I fear that the slow and tardy proceeding by indictment or information, and the uncertainty of the legal result, would little conduce to maintain

the dignity of these bodies, or to protect them from the natural effects of contemptuous and defamatory libels. I am free to confess that this power of commitment for libel may be abused, but, of two evils, it is far better that this privilege should be confided to bodies selected by their sovereign and the people, for great and important purposes, than to leave them without those means of self-defence which are common to all courts of justice. Nor could we limit and define the cases within which such powers ought to be circumscribed, without materially affecting and restraining the council in the free exercise of its functions. The counsel for the Defendants appears to consider the privileges of both houses of parliament, of punishing for contempt, to be derived from the *Aula Regis*, which exercised all the authority of a supreme court of justice; but the ecclesiastical and Admiralty Courts which do not derive their jurisdiction from the same source, exercise the same right of punishing summarily all contempts committed against their dignity and authority. (1)

It has been said that the proceedings taken against the Applicant, as set forth in the return, have been irregular, and the return defective, and the precedent, in *The King* vs. *Perry*, has been referred to as illustrative of this position. I do admit that the return is wanting in that explicative precision which might be desirable. But, considering this as a conviction by the legislative council, adjudging these Defendants to be guilty of a breach of the privileges of that honourable house, I feel myself bound by the law which is laid down by lord chief justice *de Grey*, (2) and since recognized as high authority, to pronounce that these proceedings are unexaminable here.

In giving this opinion on the question how far the legislative council and assembly may proceed to enquire summarily, and to commit during the session, for contempt, I cannot but feel that I have been somewhat influenced by the case of *The King* vs. *Monk*, (3) which occurred here in the year 1817, and of the notice given in the journals of the assembly of the year 1818, of the predicament in which general Carmichael was placed, when commanding His Majesty's troops in Jamaica. But I beg it to be understood that I am not prepared to say that no case could occur, or be presented to us in any shape, of assumed privilege, in which this court might not feel itself bound to relieve the subject from a commitment. I am of opinion that the Defendant must be remanded.

(1) Clark's *Praxis*, tit. LII.

(2) 3 Wilson, 199.

(3) Supra, p. 167.

BOWEN, J. : By the return to this writ, it is certified to us that the Applicant, Daniel Tracey, stands committed to the common gaol of this district, upon a warrant of commitment made by the legislative council of this province. From this commitment so returned, the party has applied to be discharged, principally upon the ground that neither the legislative council nor the assembly of this province have the right to convict for libel, and to commit the offender thereon, as guilty of a breach of the privileges of the house, and that the offender can only be proceeded against by the ordinary course in the courts of law. Objections have likewise been made to the form of the proceedings returned to this court, as that it does not appear *by the commitment* that the party was brought in custody or had communication of the charge: that he was called on to make answer, or did answer, or that he was present when convicted and sentence pronounced, these last being *purely technical*, will be best considered after the main question submitted to our consideration shall have been disposed of.

It is not denied that, in England, both houses of parliament have frequently enforced the same rights which have been exercised by the legislative council in this instance, but it is said the houses of parliament, in England, derive their authority from long and immemorial usage, and claim it as an inherent right derived to them from the judicial authority formerly exercised by both branches of the legislature, as part of the *Aula Regis*. And, it is contended that, as the legislative council and the house of assembly of this province owe their origin to the constitutional act, 31 Geo. III, ch. XXXI, they cannot legally exercise such power, having no inherent right to it. Unless, first, that it be expressly granted to them by that statute, or, secondly, that it be "*necessarily incident*," to the correct discharge of the functions required of them by the act. It is however, admitted that, if the legislative council have the *power to convict*, which is denied; then the question of *libel* or *no libel* cannot be examined into by the court, upon the return to the *habeas corpus*. This admission is perfectly correct, for, not having the supposed libel and proceedings before us, nor the means of bringing them under our view, either by appeal or *certiorari*, we cannot know any thing of their contents. Looking at the act, 31 Geo. III, ch. XXXI, we find that the provincial legislature is empowered "to make laws for the peace, welfare and good government of the province." and, in no part of this act, is there any mention of what shall be the privileges of either branch of the provincial legislature, but it is certainly true that the framers of it intended to confer upon the provinces of Upper and

Lower Canada, a constitution modeled, as far as circumstances would permit, precisely upon that of Great Britain. It has been well observed, by Sir *William Blackstone*, treating upon this very subject, " that the privileges of parliament are large and indefinite: that, if all the privileges of parliament were once to be set down and *ascertained*, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and *under pretence thereof* to harass any refractory member, and violate the freedom of parliament; the dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges *indefinite*." (1) *Chitty*, in his notes upon this passage, combats the doctrine, and the compilers of a more recent edition of the commentaries, think, with *Chitty*, that the privileges of parliament ought *to be defined*; though they add, *it is difficult to do so*, where the *same power that binds* may *loosen*. But a more intelligible and clear reason why the houses of parliament should have the power to punish libels on either house, and which is equally applicable to the colonial legislature, will be found in *Holt*, wherein he treats "of libels against the two houses of parliament." (2) " The doctrine of contempts," says the author, " as it lies open to *natural* reason, and as it has been explained by all our soundest lawyers, may be laid in *one* principle: it is the self-defence of a court, of its *moral* person and functions. The origin and necessity of it are intelligible in the mere statement. It is evident from the mere statement, that this privilege of punishing contempts answers to *self-defence* amongst individuals, being the defence of the dignity, body and functions of the court. Self-defence in an individual embraces three points, character, personal security and personal liberty. Now, a *moral* person has the same properties, and, therefore, the same subjects of self-defence. The character of a *moral body* is its dignity, and the liberty and security of a moral body are the free exercise of its *political functions*, and the *free enjoyment* of its *political rights*. The first contempts, therefore, and the privileges which are founded upon them, are those which respect the character of the two houses of parliament, and, hence, it may be laid down as a general principle, that whatever grossly reflects on the character of a member of either house, whatever imputes to him, what it whould be a libel (3) to impute

(1) 1 Black Comm., 164.

(2) Holt, *on libel*, 117, ch. VIII.

(3) Written imputations as affecting a member of parliament may amount to a breach of privilege without perhaps being libels at common law.

to an ordinary person, is a contempt, and, thereby, breach of privilege; it is a direct assault upon his character, and, through *the odium* presumed to be excited thereby a *consequential obstruction* of his political duties. It has been demanded why privilege of parliament should interpose where the act it cognizable by common-law? The common law has given a remedy, and more particularly in the case of libels and assaults, where is the equity therefore, or where the necessity, that the same offence should be doubly punished, or that of two possible courses of proceeding, that should be chosen, which takes from the accused the forms of trial, the security of a known law and a settled jurisdiction? To this it may be answered, that *it is not contrary* to any known rule of law, and certainly not to any maxim of *natural justice*, that there should be *two remedies* for the same evil, and that where the parliament, as a court, and the law, have a concurrent jurisdiction, either, or both, should vindicate its right. It is not *two* punishments, and each of them *equal* to *the act* for the same offence, but two punishments for different parts of the offence; two satisfactions for two wounded interests. Parliament is injured in its privilege, the law in the public or private wrong. Parliament *heal* their privilege, and the law takes compensation, for its own wrong. *Is it not thus in libels at common law?* The party has an action for the special damage to himself, and the King an indictment for the injury to the public peace. In all these cases, however, of concurrent jurisdiction, it is certainly an argument to the *prudence* and *discretion* of either house to consider whether the penal hand of the law be not sufficient, and whether that *necessity* in which the *anomalous* power of privilege is founded does not cease to exist where the law is at hand with its sword and its shield." From the principles here stated it appears to follow as a *direct consequence*, an *incontrovertible truth*, that the right of the moral person, namely the legislative council, to convict and punish in a summary manner, persons guilty of a gross outrage or scandalous libel upon that body, must exist without having recourse to the ordinary modes of proceeding in the courts of law, which the legislative council could not effect by a civil action, because, as a body, no such action could be maintained nor even by indictment, in a court of criminal jurisdiction: first, because such indictment would depend upon the will of the Crown, and, secondly, because the offence would be tried as a breach of the peace, and not as a violation of the privileges of the house: with this right then, they are vested as being *necessarily incident* to the free exercise of their political functions, abstracted from every consideration connected with judicial authority, which that body is said generally not

to possess. The privileges of parliament, like the prerogatives of the Crown, are the rights and privileges of the people. The language of Lord *Ellenborough*, in the case of *Burdett* vs. *Abbot*, in 1811, is also strictly applicable to the case before us. "The privileges which belong to them (the houses of parliament), seem, at all times, to have been, and *necessarily must be*, inherent in them, *independent of any precedent:* it was necessary that they should have the most *complete personal* security, to enable them to *meet freely*, for the purpose of discharging their important functions, and, also, that they should have the right of *self-protection;* I do not mean," says that learned judge, "merely against acts of individual wrong; for poor and impotent, indeed, would be the privileges of parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their parliamentary functions. *Independently* of any precedents or recognized *practice* on the subject, such a body must *à priori*, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On *this* ground it has been, I believe, very generally admitted in argument, that the house of commons must be, and is authorised to remove any *immediate* obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection; it must also have the power of protecting itself from insult and indignity, wherever offered, by punishing those who offer it. Can the high court of parliament, or either of the two houses of which it consists be deemed not to possess, intrinsically, that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two houses of parliament, in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, and in his endeavour to resort to the place where parliament is holden? and would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they *should wait* the comparatively tardy result of a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and insult." In the lords, on the 12th April, 1831, the Earl of *Limerick* called the attention of the house to a paragraph in the *Times* newspaper of the preceding Saturday,

terming him "a thing with human pretensions, who did not blush to treat the mere proposal of establishing a fund for the relief of the distressed and helpless Irish, with brutal ridicule or almost impious scorn." After a debate in which Lord *Eldon* and others declared their approbation of such attacks being noticed by the house, the motion "that the printer of the *Times* be ordered to attend at the bar of this house to-morrow," was carried without a division. On the next day, he appeared and was committed to custody, with the usual vote. In the course in the debate, lord *Tenterden* said: "And why was this power conferred? It was conferred, not for the protection of those who possessed it, not for the sake of the house of lords, not for the sake of the house of commons, not for the sake of the courts of law, all of whom were in equal possession of the power, (1) but, for the sake of the nation at large, for whose welfare and well government it was absolutely necessary, that all men should be taught to pay due reverence to the great legislative council of the kingdom, and to those tribunals of justice in which the laws of the land were administered. It was for these reasons that the houses of parliament and the courts of law possessed this power; it was for these reasons they ought to possess it, and *he was quite sure* that, if they, and especially the *two* houses of parliament, did not posses this power of vindicating *themselves*, it would be impossible that their respective duties could be performed with dignity to themselves, or with advantage to the country." This again shews the privilege in question does not depend, as has been argued in the present instance, upon the judicial authority vested in the body exercising the right of imprisonment for libel; but upon the principle of self-defence, as much and as correctly applicable to the legislative council, as a branch of the provincial legislature, as it can *possibly* be to either branch of the parliament of Great Britain. Besides, by the conviction before us, the legislative council have done no more than the

(1) A proposition for fining the printer failed, and the Lord Chancellor, in a most eloquent speech, set lord Tenterden right, and shewed that the *right to fine* did not exist in the commons. The following is an extract :—

"Good God! my lords, whoever heard, till this moment, when were you ever told, till this day, when you have been told it by a Lord Chief Justice of England, that the house of commons has a right to inflict *fines* and imprisonment upon His Majesty's subjects, in vindication of their privileges? No one who knows any thing of the law and constitution of the country can hesitate, for a moment, in saying that my Lord Chief Justice is grievously in error here, and, until I am told by my noble friend, in terms the most clear, and the most explicit, I will not believe that he is prepared to defend and justify, in law, what he has thus said; for he has thereby conferred upon the house of commons a power which none of his learned, none of his worst, none of his most corrupt, none of his least calm, his least temperate, or his least respectable predecessors ever dreamt of arming the commons with."

house of commons has invariably done upon similar occasions, imprisoned the offender, during the session of the legislature, and, in so doing, have exercised a power which, during a period of *nearly forty years*, has been frequently exercised by the assembly of this province, and more particularly in the recent case of *Monk*, who, on the 21st February, 1817, was committed to the common gaol, *during pleasure*, by the assembly, for a contempt and violation of its privileges, and was subsequently discharged by the court, on the 22nd of March, the same day on which the legislature was prorogued. That these privileges have likewise been acted upon by other provincial legislatures, and have been recognized by the highest authority, may be seen by the Journals of the assembly of Jamaica, in 1808, in the case of major general *Carmichael*, and by the Journals of the assembly of this province, in the case of *Monk*, in the year 1818, in which the cases are collected.

With respect to the objections taken to the warrant of commitment in this case, it is a sufficient answer to say, that it does appear the party has been *convicted* for a breach of the privileges of the house committing him; the same *certainty* is not necessary in a *commitment*, which would be requisite to support a *conviction*. There is no necessity in the *commitment* to state that the party was brought before the house in custody, was made acquainted with the charge, was called upon to answer, was present when convicted and sentence pronounced: all *this must or ought to have preceded* the commitment, but the following authority is conclusive on that head: See the case of *Rex* vs. *Hawkins* (1), which is expressly recognized to be law, in *Rex* vs. *Taylor*, (2) on which *Paley* (3) observes, " indeed, it is a general rule that if a warrant of commitment in *execution, manifestly defective on the face of it*, shews that there has been a conviction; the court will not notice the defect, until the *conviction* is returned into court, and if the conviction be right, the defects in the commitment will be cured, provided the latter shews the like offence as is stated in the conviction." Much more might be urged upon the present occasion, but it is unnecessary, coinciding as I do in the judgment of the court, and, being decidedly of opinion that we cannot afford the relief sought for, therefore, let the prisoner be remanded.

TASCHEREAU, J.: This question leads us to consider, 1. If each house of the imperial parliament has a right to impri-

(1) Fort., 272.

(2) 7 D. R.; 3 M. C., 491.

(3) Paley, *on convictions*, note (*e*), p. 253.

son, for libel against that body; 2. If this right of the imperial parliament extends to both houses of the provincial legislature; and 3. If courts of justice can take cognizance of this matter. It is unquestionable that the lords and commons have invariably exercised this right, and, although it may have been questioned by some individuals, courts of justice have recognized it in all cases. The lords and commons, according to the enormity and tendency of the libel, have sometimes considered it as a contempt of their body, sometimes, as a mere breach of their privileges, but, in whatever light they may have considered it, they have uniformly exercised the right of punishing it. Examples without number, before and up to the time of the commonwealth, from the period of the re-establishment of the monarchy, to the revolution, in 1688, from that time to the end of the reign of William the Third, and from the latter period to the latest reigns, attest that, under all circumstances, either of revolution or political changes, in which England may have been placed, the two houses of parliament have always enjoyed and exercised the right of imprisoning persons, whether members of their own body or not, for breach of their privileges, either arising from injurious language, or writings derogatory to the honor and character of the house, or any of its members, after having declared them guilty of a breach of their privileges. Whatever may have been the origin of this right, whether it is derived from the *Aula Regis*, whose privileges parliament enjoyed, when both houses were united, and which they respectively preserved, when they became separated into two bodies; those precedents establish the parliamentary law on this point, as well as its utility and necessity for maintaining the dignity and independence of both houses; they also establish an acknowledgment of this right, by the courts of justice, and its analogy to their own powers. Although, on certain occasions, the house of commons may have thought it proper from circumstances of the moment, to have recourse to the ordinary tribunals, it has not thereby renounced the right of maintaining its privileges by its own authority, and the case of Sir *Francis Burdett* proves this fact. These bodies have always considered themselves as sole judges of contempts against themselves, and as guardians of their own privileges. In fine, it is a right coeval with the constitution, it is a right which may be truly said to be part of the fundamental law of parliament. Parliamentary law is a part of the law of the land, and part of this *lex terræ* is to be found in the great charter, wherein it is declared "that no freeman shall be imprisoned, unless in virtue of a judgment of his peers, or *by the law of the land*." This right, so essential to the liberty of speech, to

the independence of these bodies, and to the general safety of the state, as well as of these bodies themselves, must be considered as inherent in them. It is upon these principles that prosecutions instituted in courts of justice, in order to contest these rights, have been dismissed, and that persons brought before them by *habeas corpus*, have been invariably remanded upon sight of the return to the writ, when it appeared they were committed by warrant of the speaker. This province enjoys a constitution similar to that of England, in virtue of a particular statute, it is true, to make laws for the welfare and good government of the province. Although the statutes mention only this power, it does not deprive the colonial legislature of their powers which are inherent and necessary to bodies constituted to perform their duties with liberty, independence and for the general good. Each body of the colonial legislature must have, in itself, the elements of its own preservation, and possess those rights which are inherent to similar bodies, and without which it would be constantly exposed to contempt and destruction. Then, where, to what country or body, must it look to seek for its powers and protecting laws, if it is not to the bodies, both houses of imperial parliament, who have given the country a participation in a free, but strong and powerful constitution, capable of maintaining itself? If, in England, this power is recognized as inherent in the constitution, that is to say, as a parliamentary law, necessary to the independence of their bodies, as a law of the country, it exists in this country. In granting us the constitution, Great Britain has given us the laws to protect it. Although the constitutional act maintains but certain particular duties, this does not deprive the colonial legislature of the other powers which are enjoyed by the other colonies, where constitutions are only established by charter; indeed the provincial legislature has performed other duties inherent in the imperial parliament, and the right of doing which cannot be denied to our provincial legislature, although not mentioned in the constitutional acts, and their duties are also of high importance, and required power and independence of a constitutional character to fulfil them. These rights have been claimed and exercised in this country, since the commencement of the constitution, and the same thing has obtained in other colonies, in Jamaica, as well as elsewhere, and they have been sanctioned by the courts of justice of this country, in the case of *Samuel Wentworth Monk*. It is true that this case was for a contempt of the house; but the constitutional act does not maintain the case of contempt more than it does that of a simple breach of privilege, and if the court considered that the house had a right to imprison *Samuel Wentworth*

Monk, for a contempt, notwithstanding the silence of the constitutional act, on the same subject, by analogy, the courts cannot deny it the right of imprisoning for a breach of privilege, by the publication of a libel, since this right of noticing and protecting its own privileges is as essential as the right of judging on contempts of its own body. This power must be considered in this country as in England, as the law of the land, and which could not be yielded without the concurrence of the three branches. The legislative council, as well as the assembly, being the sole judge of contempts against its own body, the guardian of its own privileges, it had jurisdiction in the present instance, and if it had jurisdiction, it being a body not inferior to other tribunals, we have not the power to revise its proceedings, we are not a court of appeal, from what it may have decided. We cannot take cognizance of its privileges, it belongs *ad aliud examen*. The *habeas corpus* act, in England, could not certainly give to one judge alone, in chambers, or to a court the power of judging the privileges of the lords and commons, neither, then, can the *habeas corpus* act give us the right of judging the privileges of the legislative council or assembly. The bill of rights, which forms part of the parliamentary law says that, "the liberty of speech and debate, or *proceedings in parliament* shall not be impleaded, nor be called in question, by any court, or other place, out of parliament." This act or charter which, comparatively speaking, is not of ancient date, is but declaratory of these ancient and necessary rights and privileges of parliament. This act is as much in force in this province as in England. We granted the *habeas corpus*, not being aware of the exact nature of the commitment, but now that we see that it is in consequence of a judgment of the legislative council, respecting its privileges, and that the imprisonment is in execution of that judgment, we must stop, and cannot liberate the person imprisoned, nor admit him to bail. It is necessary to be observed that great confusion and disorder would follow, if we could, upon a writ of *habeas corpus* examine and determine upon contempts of higher courts. This power of committing flows from the primary principles of justice, for, if the council has a right to decide, it has also the right to punish. It has been objected that, the power of either house to imprison for libel is contrary to the law, which leaves the decision of such cases to juries, and especially to Mr. *Fox's* act, which leaves all, the fact of the publication as well as the question of libel, to the jury. But this act was never intended to annul the rights and privileges of parliament. It affects only those cases brought before a jury, and not those brought before parliament, and, moreover, the case of *Burdett*, in which this question was

decided after solemn argument, is long posterior to Mr. *Fox's* act, which is the 32d Geo. III, ch. LX. It has been also stated that the case of *Burdett* was one where the house had punished one of its own members. But, in that case, the court took not into consideration whether he was a member or not, it decided on the general question as to whether the commons could take cognizance of a libel published against its own body, and punish the author. It has been farther objected that the prisoners have been condemned without being heard in their defence. But the answer to this is to be found in the commitment. It appears, by the commitment, that they have been found guilty of a breach of privilege. This supposes that they have been previously heard. We have nothing to say on the mode of proceeding in parliament, they have their system as we have ours; they have jurisdiction, and that is sufficient to stop us from going any further. For these reasons, and those given by the other learned judges, I am of opinion that we cannot liberate the prisoner on the present occasion, and he must be remanded. *(Stuart's Rep.*, p. 478)

The same order was entered, in the case of *Ludger Duvernay*, brought before the court, by another writ of *habeas corpus*, upon a conviction by the legislative council, on the 17th January, 1832, for a similar breach of privilege in publishing in the paper intituled "*La Minerve*," on Monday, the 9th January, 1832, a libel upon the legislative council.

NAVIGABLE AND FLOATABLE RIVERS.

COURT of KING'S BENCH, Quebec, 20th October, 1832.

OLIVA, against BOISSONNAULT.

Held: That navigable rivers have always been regarded as public highways, and dependencies of the public domain; and floatable rivers are regarded in the same light. In both, the public have a legal servitude, for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude. (1)

This was an action of damages, by the Plaintiff against the Defendant, for obstructing the river *St. Thomas*, by booms and otherwise, and, thereby, stopping certain logs of timber, in their descent towards the St. Lawrence, from the land of the Plaintiff, which lies on the same river *St. Thomas*, above that of the Defendant, and, thus, interrupting the free passage of the river. The Defendant averred *that the river St. Thomas*

(1) V. art. 400 C. C.

was not a navigable river, and that the Plaintiff and others, had therefore no legal right to use the waters of that river, for floating logs to the St. Lawrence, or other similar purposes.

SEWELL, CH. J : It may, I think, be received as a general principle, that the public have a right to all the advantages, suited to public purposes, which the natural state of a river affords, and that no change can be effected in the state and condition of a river, which does afford such advantages, unless some greater degree of convenience is thereby obtained for the public (1). Where there is a small stream of running water, *cours d'eau*, the owners of the land over which it flows, have certainly a right to make use of so much of it as is necessary for their convenience, during its passage. But, even, in such streams, the law carefully protects the rights of all who may be benefited by the water which flows in them. The quantity of water, in such cases, is in fact so small, that it can only be applied to the ordinary purposes of life. But, whoever does so apply it, is bound to do it in a manner which is not inconsistent with the rights of other owners of lands over which the stream naturally flows. A partial diminution of its quantity, if reasonable and necessary, is permitted; but, he who avails himself of this permission, in the exercise of his right, must not injure or annoy his neighbour, by causing it to flow back upon his land, nor will the law allow him to divert the water from its course, or to detain it unreasonably. " Si le propriétaire d'un héritage," says *Toullier*, (2) " qui " traverse un courant d'eau, pouvait détourner ce courant, ou " en retenir toutes les eaux, au préjudice du fonds inférieur, " le propriétaire supérieur aurait le même droit. La loi donc " s'y oppose par un motif d'équité ; et, en défendant à l'un et " à l'autre de détourner le cours de l'eau, protège également " leurs propriétés par la limitation même qu'elle y apporte. " Ils peuvent user de l'eau pendant qu'elle traverse leur " héritage, l'y faire circuler, comme bon leur semble, mais à la " charge de la rendre, à la sortie de leur fonds, à son cours " ordinaire." (3) The maxim, therefore, "*sic utere tuo ut alienum non lædas*," applies in its full force to the enjoyment of brooks and rivulets *by individuals*, and, *à fortiori*, must be equally applicable to the enjoyment of rivers, in which the volume of water is so great, as not only to benefit individuals, but to afford additional advantages, which benefit the public at large. Accordingly, in the law of France, navigable rivers have always been regarded as public highways, and, as such,

(1) 2 Starkie, *The case of lord Grosvenor.*

(2) 3 Toullier, p. 90.

(3) 2 Henry's, p. 999 to 1002.

dependencies of the public domain; (1) and floatable rivers (rivières flottables, as they are there termed) have been viewed in the same light. (2) In every river which is navigable for boats or larger vessels, and in every river which is floatable, that is to say, capable of floating logs or rafts, (3) the public, as in England (4) and in America, (5) have an easement or legal servitude, viz. a right of passage, as in a public highway, and, consequently, the proprietors of the adjoining banks, be they who they may, can neither use the bed or the water of such rivers (in what regards the public) in any way which is inconsistent with the easement to which the public are so entitled. (6) The evidence in this case may not be sufficient to shew that the river Saint Thomas is a *rivière navigable.* But the fact that the logs floated down the stream, from the Plaintiff's land to the Defendant's, and were there stopped, in their progress towards the Saint Lawrence, by the boom which the latter has constructed, proves it to be a "rivière flottable," and judgment, therefore, must be entered up for the Plaintiff.

Let it be referred to experts to report the quantum of the damages which the Plaintiff has sustained. (*Stuart's Rep.* p. 524.)

PRIVY COUNCIL.—APPEAL.

PRIVY COUNCIL, 29th November, 1832.

AUSTIN CUVILLIER, Appellant, and OBADIAH AYLWIN, Respondent.

An act of the parliament of Great Britain declared, that all laws passed by the legislature of a colony should be valid and binding, within the colony, and directed that the colonial Court of Appeal should be subjected to such appeal as it was previously to the passing of the act, and also to such further and other provisions as might be made in that behalf by any act of the colonial legislature: *Held*, that, an act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of

(1) 1 Fèvre de la Planche, p. 15.

(2) Ordonnances des Eaux, etc., tit. XXVII; de la Police, etc., des Eaux, art. 44, 45, and 46.
Pandectes françaises, vol. V, p. 108; Kent's Com., vol. III, p. 342; Toullier, vol. III, p. 99, n° 145.

(3) L. C. Denizart, vol. IX, *Flottage.*

(4) Hale, *De jure maris*, Pars prima, ch. III, p. 309.

(5) 3 Kent's Com., 344.

(6) See the Royal Declaration of January, 1663, in Bacquet, vol. I, p. 457.

less amount, could not be received by the King in council, although there was a special saving, in the colonial act, of the rights and prerogatives of the Crown. (1)

The act of parliament, 31 Geo. III, ch. XXXI, commonly called the Canada Act, enacts, (2) that there shall be a legislative council and house of assembly, in each of the provinces of Upper and Lower Canada, and that, "in each of the said "provinces respectively, His Majesty, his heirs or successors, "shall have power, during the continuance of this act, by and "with the advice and consent of the legislative council and "assembly of such provinces respectively, to make laws for "the peace, welfare and good government thereof, such laws "not being repugnant to this act; and that all such laws, "being passed by the legislative council and assembly of "either of the said provinces respectively, and assented to by "His Majesty, his heirs or successors, or assented to, in His "Majesty's name, by such person as His Majesty, his heirs or "successors, shall, from time to time, appoint to be the "governor, or lieutenant governor of such province, or by "such person as His Majesty, his heirs or successors, shall, "from time to time, appoint to administer the government, "within the same, shall be, and the same are hereby declared "to be, by virtue of, and under the authority of this act, "valid and binding, to all intents and purposes whatever, "within the province in which the same shall have been so "passed". There is also a provision, in this act, for the transmission, by the governor, lieutenant governor, or other person administering the government, by the first convenient opportunity, of all bills which have been passed by the legislative council and assembly, and assented to by him in His Majesty's name, to one of the principal secretaries of state; and also power reserved to the King of disallowing any such bill, within two years (3) after it has been received by the secretary of state (4) The 34th section also

(1) V. art. 1178 C. P. C.

(2) Sec. 2.

(3) The greater part of the colonial statutes receive no express confirmation by the King, and are held to be valid without it. Those only are confirmed which relate to measures of general and peculiar importance, or interest, or contain a clause suspending their operation, until the King's pleasure is known, the latter of which, if not confirmed within three years from their passing, (*two years by sec. 57 of c. III of 30, 31 V. The British North America Act, 1867*) are considered as disallowed, by the provisions of an order of council of the 6th of January, 1806. Both the confirmation and disallowance of colonial statutes are subjects of a special order, by the King in council. *See* report on Barbadoes, by the commissioners for enquiring into the administration of civil and criminal justice in the West Indies, p. 9.

(4) Sec. 31.

directs, " that the governor or lieutenant governor, or person " administering the government of each of the said provinces " respectively, together with such executive council as shall " be appointed by His Majesty for the affairs of such province, " shall be a court of civil jurisdiction, within each of the said " provinces respectively, for hearing and determining appeals " within the same, in the like cases, and in like manner and " form, and subject to such appeal therefrom, as such appeals " might before the passing of this act have been heard and " determined by the governor and council of the province of " Quebec; but subject, nevertheless, to such further or other " provisions as may be made in this behalf by any act of the " legislative council and assembly of either of the said pro- " vinces respectively, assented to by His Majesty, his heirs or " successors."

The legislative council and assembly of Lower Canada passed an act, in the 34th year of King Geo. III, commonly called the judicature act, which was assented to by the governor for the time being, transmitted by him to the secretary of state, for His Majesty's approval, and was not disallowed by him. The 30th section of this judicature act enacts, " that the judgment of the Court of Appeals shall be " final, in all cases, where the matter in dispute shall not " exceed the sum or value of £500 sterling; but, in cases " exceeding that sum or value, as well as in all cases where " the matter in question shall relate to any fee of office, duty, " rent, revenue, or any sum or sums of money payable to " His Majesty, titles to lands or tenements, annual rents, or " such like matters or things, where the rights in future may " be bound, an appeal shall be to His Majesty in his privy " council, though the immediate sum or value appealed for be " less than £500 sterling, provided security be first duly given " by the Appellant, that he will effectually prosecute his " appeal and answer the condemnation, and also pay such " costs and damages as shall be awarded by His Majesty in " his privy council, in case the judgment of the said Court of " Appeals of this province be affirmed; or provided that the " Appellant agrees and declares in writing, at the clerk's office " of the court appealed from, that he does not object to the " judgment against him being carried into effect according to " law, on which condition he shall give sureties for the costs " of appeal only, in case the appeal is dismissed; and, on " condition, also, that the appellees shall not be obliged to " render and return to the Appellant more than the net " proceeds of the execution, with legal interest on the sum " recovered or the restitution of the real property, and of the " net value of the produce and revenues of the real property,

" whereof the appellee has been put in possession, by virtue " of the execution, to take place from the day he recovered " the sum, or possessed the real property, until perfect " restitution is made, but without any damage against the " appellee, by reason of such execution, in case that the judg- " ment be reversed, any law, custom, or usage to the contrary " notwithstanding." In the 43rd section of this act, there is a proviso, " that nothing therein contained shall be construed, " in any manner, to derogate from the rights of the Crown, " to erect, constitute and appoint courts of civil or criminal " jurisdiction within this province, and to appoint, from time " to time, the judges and officers thereof, as His Majesty, his " heirs or successors shall think necessary or proper for the " circumstances of this province, or to derogate from any " other right or prerogative of the Crown whatsoever."

The Respondent, in this case, had obtained a judgment of the Court of Appeals for Lower Canada, dated the 20th of November, 1816 (reversing a previous one of the Court of King's Bench for Montreal), for the sum of £397 14s. 7d. currency, and costs, and sued out execution upon it. The Appellant then filed a writ of " opposition to the execution (somewhat resembling the *auditâ querelâ* (1), and put in pleadings, called *Moyens d'opposition*, in support of it. To these pleadings, the Respondent put in an answer, and the Court of King's Bench, at Montreal, ultimately granted *mainlevée* on the execution, which it declared to have been illegally obtained. The Respondent then appealed to the Court of Appeals, and that tribunal, by a judgment, dated the 30th July, 1821, reversed the judgment of the Court of King's Bench.

In July, 1823, the Appellant presented a petition to the King in council, for leave to appeal from both the judgments of the Court of Appeals, of the 20th of November, 1816 and and the 30th of July, 1821 ; and, on the 23rd June, 1824, he obtained an order of council, that he should be permitted to do so, without prejudice to the question, whether the appeal was competent or not, upon giving security, in the sum of £100, to prosecute the appeal within a year and a day from the date of the order, and to stand the determination, in case the appeal should be dismissed. In December, 1826, the Respondent presented his petition to the King in council, that the Appellant's petition should be dismissed, with costs This petition was heard before the committee for hearing plantation appeals, on the 30th of January, and 2d February, 1827, when Their Lordships ordered that cases should be printed on both sides, confined to the question of the competency

(1) *See* Pothier, *Traité de la Procédure civile*, partie 4, ch. II, art 6.

of appeal. Cases were accordingly prepared, and the petition came on now for hearing.

COLTMAN (K. C.) for the Petitioner: The right of the King in council to hear and determine appeals from the colonial courts, on every subject, and of every amount in value, is one of the most ancient and undoubted prerogatives of the Crown. (1) No prerogative right of His Majesty, much less one which is calculated, as this is, for the relief and protection of the subject in distant countries, can be abridged or abrogated, except by the most direct and express words of an act of the general legislature. The King himself cannot derogate from his own right, or refuse to exercise his own prerogative for the benefit of the subject. Lord *Mansfield*, in the case of *Hall* vs. *Campbell*, states it as a clear proposition, "that if the King has a power to alter the old, and introduce "new laws, in a conquered country, this legislation being su-"bordinate to his own authority in parliament, he cannot "make any new change, contrary to fundamental principles." (2) One of those fundamental principles has always been understood to be, the right of all who are injured by the determination of the courts, in His Majesty's colonies, to appeal to him in his council for redress. It is true, that, in the instructions to the governors of plantations, there is a limit put upon their power to allow appeals, in causes where the amount in dispute is under a certain value; but, in all those instructions, there is an express reservation of the power of the King himself, in council, to admit appeals upon any terms, and for any value. As far as regards the province of Lower Canada, there are no words in the English statute of the 31st Geo. III, which take away from the subject the right of appeal, to which he is entitled by the common law of England. The words of the provincial statute of the 34th Geo. III, are certainly more extensive; but, in that also, there are express provisoes, that nothing therein contained should derogate from the rights of the Crown, either to constitute other courts of justice, or from any other right or prerogative of the Crown whatsoever. It would, indeed, be beyond the power of a provincial legislature to take away the rights of His Majesty to receive appeals, even if such were their intention; and, if such a construction were to be put upon this provincial act, it would be inconsistent with the 31st Geo. III, which has been always regarded as the constitutional charter of the Canadas.

MASTER OF THE ROLLS: It is not necessary to hear coun-

(1) Black. Comm., vol. I, book I, ch. v, p. 231.

(2) Cowper R., 209.

sel on the other side. The King has no power to deprive the subject of any of his rights; but the King, acting with the other branches of the legislature, as one of the branches of the legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights. This petition must therefore be dismissed. (*Stuart's Rep.*, p. 527; 2 *Knapp*, p. 72; *Beauchamp*, p. 68.)

Before the institution of the foregoing appeal, the opinion of the late lord Chancellor, then Mr. BROUGHAM, was taken upon the case, and whether, under the facts therein stated, notwithstanding the statute of Lower Canada establishing a limitation of the right of appeal as above mentioned, Mr. Cuvillier might not, by petition to His Majesty, in his privy council, obtain the benefit of an appeal from the said judgment of the provincial Court of Appeals of the 30th of July, 1821.

OPINION.

I am clearly of opinion that no such limitation is valid to bar an appeal to the King in council. By law his right of appeal can only be taken from the subject by a new law. I should greatly doubt if any colonial act *though allowed by the Crown*, if unconfirmed by act of parliament, has power to take from the subject this right. But a colonial act never allowed, can clearly have no effect. Even in cases where a limitation has been validly introduced by law, the Privy Council have been in the practice of allowing appeals almost as a matter of course. Such petitions are termed petitions of *doleance*, and I believe never refused, although the law may have excluded appeals under a certain amount or after a certain time.

Lincoln's Inn, 21st June, 1823. HENRY BROUGHAM.

It would perhaps not be found inconsistent with the foregoing decision that an appeal might be allowed to His Majesty in his privy council, where the sum in dispute was less than £500 sterling, and where more than a year and a day had elapsed from the judgment in appeal, which one of the parties is desirous of bringing under the revision of His Majesty in his privy council. It would seem that, where the question arising upon the appeal from a sentence of a colonial court to His Majesty in his council, is one of ordinary municipal regulation, relating to the credibility or competency of particular witnesses, or to the weight of evidence, or to the regularity, in point of form, of the proceedings in the cause, or, generally, wherein the grievance complained of is applicable to the party appellant and confined to his cause, then the limitation of the right of appeal to certain cases in amount, would be followed by His Majesty in his privy council. And this, not merely because the limitation in question was established by the colonial legislature, but because such limitation is convenient and sanctioned by long usage, and the court of the King in council itself. Such a limitation has, at all times, existed, in relation to appeals from the French islands of Guernsey, etc., and in the old British colonies; and, as to the latter, it would probably be found that the limitation had been extended to them by analogy, from the practice which had long obtained as to the former, and to be traced to the power of entertaining or rejecting appeals from the colonies, according to a certain known practice, which the supreme court of appellate jurisdiction has, at all times, exercised, and which, being the practice of that court, is the law of it. It is difficult to conceive any other reason why appeals from interlocutors rendered in the courts of the French islands, and of the colonies, have been universally disallowed by the Privy Council, whilst appeals from interlocutors rendered in the Scotch courts have, in the cases permitted by law, been allowed by the house of lords. Appeals from Guernsey, etc., to the King in council, have in all cases exceeding £300 been allowed, and a like rule obtained in all the British colonies. In this view our provincial statute then in enacting that appeals to the King in council shall be only in cases above £500, cannot

be said to have abridged, or attempted to abridge the appellate jurisdiction of that court.

At the same time that such, it is apprehended, is the general rule, there is a class of cases which may perhaps, not be comprised within it. It seems to be essential to the maintenance of the *imperium* of a metropolitan state over its subordinate possessions, that the judicial preeminence should reside in the metropolitan state, and, therefore, that the right of judging in the last resort, as well in criminal as in civil matters arising in the colony, or subordinate state, should be held by the parent or metropolitan state: otherwise, it would be in the power of the subordinate state, by judicial decisions, to undermine and ultimately to absorb the authority of the metropolitan state. It is in questions touching the relations, however remote, between the two states, and the operation of the laws of the one, within the limits of the other, and concerning in any way, however indirectly, the sovereignty of the one over the other, that the acts of the colonial legislatures, must be interpreted, or, if need be, controlled by the authority of the metropolitan state. And, with respect to this class of cases, the King in council could and ought, it is conceived, to entertain appeals, however small the sum in controversy might be, if the cases were such as called for the interposition of the judicial authority. Thus, in the case of a decision, in the colonial courts, concerning the operation of the English bankrupt laws within the colonies: or, the statute of George the Second, enacting that lands in the colonies should be seized and taken in execution as chattels, and that examinations taken before lord mayors of towns, in Great Britain, shall, in cases, be received as evidence in the colonies, or touching the prerogative, the ecclesiastical establishment, or connected in any other way with public laws, appeals would probably be entertained by the King in council from the colonies. The above distinction appears sufficiently clear, and, according to it, the public convenience is consulted without any infringement of the right of the parent state.

The following cases may be consulted, *Christian* vs. *Corren*, 1 Peere Williams, p. 329; *Fryer* vs. *Bernard*, 2 Peere Williams, p. 261; Sel. Ca., ch. v, 9 Mod., 124. No words, in a grant, can deprive a subject of his right to appeal, much less, if the grant be silent.

ATTACHMENT.

COURT OF APPEALS, Quebec, 30th April, 1833.

On appeal from Quebec.

ROBERT WOOD, Appellant, and HORATIO GATES et al., Respondents.

Held: That the court will quash an attachment by writ of *arrêt simple*, whereby any other person than the Defendant in an action is divested of possession of property. (1)

The Respondent in this case prosecuted an action of debt, on a bond, and obtained a writ of *arrêt simple* or *saisie conservatoire*, by virtue whereof an attachment was made in the hands of the Appellant of a certain quantity of timber alleged to belong to the Defendant. The sheriff seized the timber, dispossessed the Appellant of it, and appointed a *gardien* for its safe custody. A motion was made, in the Court of King's

(1) V. art. 553, 841 et 855 C. P. C.

Bench, to quash the seizure, which was disallowed, and, thereupon, this appeal was instituted.

REID, CH. J.: The *arrêt simple* or *saisie conservatoire*, although not in general use, yet, when made upon property in the hands of the debtor, may be executed in such way as to divest him of the possession of that property; the law in certain cases gives the creditor a right, even before judgement, thus to attach his debtor's property; but, when the attachment is made in the hands of a third party, as the debtor of the debtor, or as holding property belonging to him, there cannot be a corporeal seizure of the thing attached, nor can the *tiers saisi* be dispossessed of it, inasmuch as he is not the personal debtor of the party seizing, nor liable to any condemnation, until he has made his declaration (or refused to do it), of what he owes, or has in his hands, belonging to the debtor, and, even then, he is considered only as the depositary of the thing seized, subject to the order of the court, by which only a personal liability attaches on the *tiers saisi*. The attachment of property *en main tierce*, is a mere notification, or denunciation, of the right or claim of the creditor upon the property of his debtor in the hands of a third person; it is compared by *Pigeau* to an opposition made in the hands of such third person, so as to prevent his disposing of it to the injury of the creditor; he considers it more an *acte de conservation qu'une contrainte*, and, consequently, neither the same formality is used, nor the same constraint exercised, as when enforced upon property in the hands of the debtor; nor can the possession of a third party be molested until his liability as a debtor has been ascertained. This case has more the appearance of a *saisie-exécution* than an act merely conservatory, or *saisie-arrêt* in the hands of a third party: here is a *commandement de payer*, the whole debt of the Plaintiffs, the *contrainte* or actual seizure of the timber, and the dispossessing the Appellant thereof, by the appointment of a *gardien*, proceeding which could have been warranted only on the *saisie-exécution*, and which *Bourjon* seems to consider as a nullity under the *saisie-arrêt*; he says: "Le créancier ne peut faire "*saisir* des effets, des meubles, des hardes, qui seraient entre "les mains d'un tiers, ce serait une espèce de saisie-exécution, "et non saisie-arrêt, et, par conséquent il y aurait nullité.' Although the injury here may not have been great, yet, it is the principle to which we have to look, and it must be held unjustifiable, that the property of any individual, who is not a debtor, or wrong doer, nor charged as such, should on the suggestion of another be locked up, or put into the hands of a bailiff under colour of a writ of *saisie-arrêt*. In such cases the injury may be great, but the remedy uncertain.

The Appellant's motion for setting aside the attachment is therefore granted. (1) *(Stuart's Rep.*, p. 536.*)*

SALE.—REVENDICATION.

QUEBEC, 30th April, 1833.

On appeal from Quebec.

JOB MOOR and another, Appellants, and JOSEPH DYKE and another, Respondents.

A sells a quantity of timber to B, a part of the price only to be paid on delivery of the timber. A makes a delivery, and B omits to pay any part of the price, thereupon, A brings an action to rescind the contract of sale, and, by process of *saisie revendication*, attaches the timber. *Held:* that this action could be maintained, and that the timber, so far as it could be identified, should be restored to A. (2)

In October, 1830, the Appellants sold to the Respondents a quantity of red pine timber, contained in two rafts, at 7¼d. per foot, on the following terms of payment, one fourth of the amount to be paid on the delivery of the timber, one fourth on the first of April, one fourth on the first of May, and the remaining fourth on the first of June then following. On the 5th and 6th of November, 1830, the measurement and delivery on the timber was effected, when the rafts were found to contain 100, 771 cubic feet, which, at the price stipulated, amounted to £3044 2s. 5d., of which one fourth, or £761 0s. 7d., became due and payable on the delivery of the timber. After the timber had been delivered, a part of it was hauled up on the beach, and mixed with other timber belonging to the Respondents, part of it was brought within their boom in the river, and the remainder lay on the outside of the boom. The Respondents, when called upon to pay the first instalment, which became due on the delivery, were unable to meet the demand, as they had become insolvent. On the 11th November, a protest was made against them by the Appellants, and a demand for the restoration of the timber; this having been refused, the Appellants instituted an action to obtain a rescission of the contract, and a restitution of the timber, which they caused to be attached, under a writ of *saisie revendication.*

(1) LEE *vs.* TAYLOR. *Per Curiam:* If an attachment be issued to seize property in the hands of A, and, under the writ, the sheriff attaches property in the hands of B, the seizure is null, *propter defectum auctoritatis*, and the court will restore the property to B, without enquiring into his right or title to it. B. R. Q., 1811, n° 518.

(2) V. art. 1543, 1998 et 1999 C. C., et 866 C. P. C.

REID, CH. J.: The contract is to be considered as conditional, and the delivery of the timber made only on the faith and condition of obtaining a certain portion of the stipulated price, and, as such condition had not been complied with, the vendors were deceived, the contract was broken, and, in such case, they could not be considered as having parted with their property, a principle consistent with justice and recognized by the commentators on the 176th article of the Custom of Paris. *Brodeau* says, " jusqu'à ce que le vendeur ait été payé et satisfait de sa chose qu'il a vendue sans terme, il conserve son droit de propriété, et, par consequent, de suite sur la chose, qu'il peut réclamer et vendiquer comme sienne, etc." (1) The article of the Custom seems to recognize the property as not altered by sale and delivery in such a case, as it says, that the vendor *peut sa chose poursuivre*, etc.; it calls the thing sold, *sa chose*, as descriptive of his right in it, and, hence, it is held, that the landlord, for house rent, cannot exercise his privilege on the effects purchased by his tenant, but not paid for, as they are considered not to be his property. The intent and object of the article is to restore to the vendor his property, and put him in the same state he was in, previous to the sale and delivery, which necessarily carries with it a rescission of the contract. And there can be no doubt, that, if, after the sale but before the delivery of the timber, the vendors had been made acquainted with the insolvency of the purchasers, the former would have been entitled to retain the timber, until satisfaction was made for it. So, in England, where goods are not paid for on delivery, as agreed, trover lies for them, and the principle must be universally recognized, that a conditional contract cannot be binding, until the condition be performed. The main difficulty is, whether, under the circumstances, the restitution demanded can be granted, and to what extent? It is certain that an article, of the description of that sold, does not lose identity by change of position, although it may, by change of form; logs of pine timber, having particular marks, although formed into a raft, will not be considered as losing their identity by being separated, they are not like a bale of goods, which, when opened and unpacked, their identity cannot be ascertained; but, in this case, the court considers the identity as ascertained, as well by the return of the sheriff to the writ of *saisie revendication*, as by the evidence adduced, and it will apply to all the timber seized, on the outside and within the boom of the Respondents, but, as to the logs which were hauled up on the beach, and mixed with

(1) Ferrière, *Gr. Cout.*, on 176th art., p. 1321, n° 5; Brodeau, on the same; See *supra*, 424.

other and similar timber, with similar marks, belonging to the Respondents, identity cannot be made out, and, therefore, restitution as to this part cannot be granted. The judgment of the court, therefore, is that the contract between the parties be rescinded, and annulled, and the Respondents, thereupon, condemned to restore and deliver back to the Appellants the aforesaid quantity of 100,771 feet of timber sold and delivered to them, as before mentioned, and, on default thereof, to pay the aforesaid sum of £3044 2s. 5d., and it is ordered, that the attachment on all the timber seized on the outside and within the boom of the Respondents, be maintained, and, after measurement thereof made, be restored and delivered up to the Appellants, in part payment and satisfaction of this judgment; and that *mainlevée* should be granted as to the timber hauled up on the beach. *(Stuart's Rep.*, p 538).

AYLWIN *vs.* MCNALLY. Goods sold for cash, but not paid for, may be followed and claimed, in an action of *revendication*, provided that the action be commenced within eight days after the transaction, and the goods have remained, until then, in the state in which they were delivered.

This was an action of *revendication*, in which the Plaintiff claimed goods sold and delivered upon a term of credit. *Per Curiam:* The vendor of goods sold for ready money, may revendicate: also, if he is not paid, for goods sold, to be paid for on demand. 2 *Bourjon*, 689, art. 76. But, even in this case, he must institute his action within eight days after the sale so made. *Ib.*, n° 78; 1 *Battur*, 36, and it is also essential that no act of ownership on the part of the purchaser should have been executed, and the goods must, therefore, until the commencement of the action, have remained in the indentical state and condition in which they were delivered. 2 *Bourjon*, 689, n° 79; 690, n°° 80, 81, 82; 1 *Pigeau*, 465; *Actes de notoriété* of 13th May, 1711, p. 371. It is clear, therefore, that the action, in such case, is founded upon this principle, that, according to the conditions and terms of the contract between the parties, there has not hitherto, been any sale of the goods claimed, payment before delivery having been stipulated; but, how can this be said to be law, in a case like the present, in which the vendor has sold, without any condition, has made his delivery, and has agreed to receive payment at a future period, long after delivery, 2 *Bourjon* 689, n° 75; *Pigeau*, l. c; Duplessis' *Exécutions*, lib. II, p. 8; Pothier's *Cout. d'Orl.*, 785, art. 458. note 1, by which the inference of a condition requiring payment before the sale should be perfected by delivery, is effectually destroyed. Action dismissed. B. R. Q., 1812, n° 340.

Vide an arrêt, in Grainville, of the 26th July, 1726, p. 524; and 2 De Lamoignon, 149, and seq., where the principle of this decision seems to be contradicted, but, it is to be observed that the authorities above cited are in date posterior to the time at which De Lamoignon wrote.

In France, manufacturers seem to have possessed a right to revendicate, in all instances and at all times, if not paid, but this was an exception to the general rule. See an arrêt cited in Roque. *Jur. Consul.*, vol. II, p. 44.

GOVERNOR.—ACTION AGAINST HIM.

COURT of KING'S BENCH, Quebec, 7th June, 1833.

HARVEY, against MATTHEW LORD AYLMER.

Held: That an action cannot be maintained against a governor of this province, while in the administration of the government. (1)

The Plaintiff's declaration alleged that, in November last, she was hired, as housekeeper, to the Defendant, at the rate of £40 sterling per annum, but was discharged from his service, at the expiration of two months, without just or sufficient cause, by which she had sustained £100 sterling, damages. The Defendant, by a declinatory exception, after alleging that he was governor of the province, averred that, so long as he continued to execute the said office and trust, no suit or action could be had or maintained against him, in any of His Majesty's courts of justice, within this province, for any matter, cause or thing whatsoever.

BOWEN, for the Defendant: This exception of the Defendant differs from the ordinary English plea to the jurisdiction in this respect, it contains no allegation of a better or more proper jurisdiction, because, in fact, there is no other tribunal to which the Defendant is at present amenable, the King in council cannot hold plea of any kind, and the courts, in England, can exercise no jurisdiction over him, as long as he resides here. His situation, in this country, is, in many respects, analogous to that of a foreign ambassador residing in England, and it is certain that, in a plea to the jurisdiction of the King's courts, in England, a foreign ambassador could not be expected to allege another jurisdiction; this case, therefore, is an exception to the general rule; the facts are distinctly libelled, which is all that can be required. It may be objected that the Defendant's commission has not been produced, in support of the exception, but, it is contended that it is the duty of His Majesty's subjects, within this colony, to know that the Defendant is governor in chief of this province, and, more particularly, of the judges of the courts of justice to know the governor's hand and seal, and to enforce obedience to his proclamations: this court must know judicially that the Defendant is governor of the province. The necessity of the allegation, in the exception, that the Defendant is captain general and governor in chief of Canada, arises from the omission on the part of the Plaintiff to give him his proper additions, to which the Defendant might have objected, were

(1) V. art. 14 et 19 C. P. C.

he not disposed to afford every possible facility to the Plaintiff, in obtaining a hearing of her cause, provided it could be done with propriety.

Whether the courts, in this province, can legally entertain any action against the governor, is the only question of importance which the case presents. For its determination, it will be necessary to ascertain the nature of the trust, and the extent of the powers conferred upon governors of colonies. A governor is one of the constituent parts of the colonial legislature, and, as such, is invested with royal authority; he can call, prorogue, adjourn and dissolve it; he has, with very few exceptions, the appointment to all government offices, and is actually the fountain of all honor, within this province, and within the limits of his government, invested with supreme power. (1) It is from the like attribute of preeminence, or supreme power, that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him, *for all jurisdiction implies superiority of power;* authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to enforce the execution of its judgment; hence, it is that the person of the king is sacred, no jurisdiction has the power to try or condemn him, for, if such a power were vested in any domestic tribunal, there would be an end to the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power. If the court can entertain an action against the governor of the province, it must also have the power to enforce the judgment, for authority to try is vain and idle, without authority to redress: it must also have the right to take his person in satisfaction. The governor must also be subject to arrest, at the suit of any individual to whom he may happen to owe a sum of £10 sterling, should his duty call him from Lower to Upper Canada, or to some other part of the provinces, within the limits of his government. If the free agency of the King, as one of the constituent parts of the sovereign legislative power, cannot constitutionally be destroyed, the free agency of the governor, as the head of the provincial legislature, must, for the same reason, be preserved; to what end would the courts pronounce a judgment against the Defendant which it could not enforce, for, he is not liable to criminal process, and, therefore, could not be committed for a contempt of court, if he thought fit to resist the execution of its judgment. Previous to the passing of the imperial statute, 12th William III, ch. XII, governors

(1) Chitty, *on the Prerog.*, 34, 35, 36.

of colonies were not *answerable, even in England*, for any crime or offence they might commit within the limits of their respective governments, because, by the common law, an indictment could only be preferred in the country where the offence was committed, nor, as appears by the preamble to that statute, were they accountable, for such their crimes and offences, to any person within their respective governments. Thus, it appears that governors of colonies are not now, and never were considered amenable to the courts within the limits of their respective governments for criminal offences. Now, if their privilege has hitherto preserved the King's representatives from the jurisdiction of the courts within the limits of their respective governments, even when charged or accused of capital crimes, the same privileges, with much less danger to the public peace, will necessarily preserve their free agency, and protect them from the jurisdictions of the courts, in civil matters. The imperial parliament, in passing the law before alluded to, for the protection of His Majesty's subjects within the colonies, by rendering governors amenable in England, for such offences as they might commit within the limits of their governments, would certainly not have omitted to provide a remedy, at the same time, for the redress of civil injuries, had it not been known that all personal actions against governors might be brought in England. In fact, the precedents of actions against governors of colonies, upon their return home, after being recalled, are so numerous, that I shall not take up the time of the court by citing any of them; no precedent, however, of an action maintained against the governor of a colony, within the limits of his government, is to be found. The oldest case at all analogous to the present occurred at New York, in 1733. Mr. *Van Dam*, who had performed the duties of president, during the absence of governor *Crosby*, in England, attempted, upon his return to New York, to summon Mr. *Crosby*, before the King's courts there, in an action for money had and received, but, in this attempt he was not successful, the prothonotary refused to affix the seal of the court to the writ, nor would the court order it. (1) In this colony, governors have occasionally come in collision with His Majesty's subjects, but no attempt was ever before heard of to render them amenable to the courts of the province. Soon after the conquest of Canada, *Pierre de Calvert*, a French gentleman, fell under the displeasure of His Majesty's representative, general Haldimand, and was imprisoned by him for three years, and then discharged without trial. *Calvert* submitted a memorial to lord *North*

(1) 1 Smith's *History of New Work*, 5.

and Mr. *Fox*, and, upon a change of ministry, lord *Sidney;* these memorials were published, with a statement of the case, in London, in 1774, dedicated to His Majesty. These memorials all contain a prayer for an order upon general *Haldimand* to proceed direct to England, to prevent his returning to Switzerland, of which country he was a native, and the reason assigned for so doing was, that he could not be sued in the province of *Quebec*, so long as he continued governor, his high office placing him above the jurisdiction of the courts of the province, and because, during his residence therein, he was beyond the reach of the King's courts at Westminster Hall. In the appendix to a work published in London, in 1776, intituled "An account of the proceedings of the British and other protestant inhabitants of Quebec, in North America, to obtain a house of assembly," will be found some remarks on the illegal arrest of Mr. *Thomas Walker*, by *G. A. Carlton's* warrant, in 1775. The writer is supposed to be Mr. *Mazeres*, formerly attorney general of the province, after citing authorities of imprisoning by his own warrant, to shew that the power is withheld from the King himself, and, for this reason, that, if he was to do wrong, the injured party would have no action against him, observes that the same law subsists in the American provinces, with respect to the power of the governor, and, for the same reason, he cannot imprison any of the King's subjects, under his government, by his own warrant, or order of commitment, because he cannot be sued and compelled to pay damages to the party whom he might thereby have injured, in the court of the province of which he is the governor. These cases are, of course, not cited as authority, but as written reason, and, in the absence of authority, as historical facts. But the judgment of lord *Mansfield*, in the case of *Fabrigas* vs. *Mostyn*, (1) is conclusive upon this question; the action was for banishment and false imprisonment. A verdict and judgment was given against the Defendant for £3,000 damages; upon the refusal of the Common Pleas to grant a new trial, general *Mostyn* resorted to a writ of error, the case was accordingly heard before lord *Mansfield*, in the King's Bench, and the judgment of the Common Pleas affirmed. One of the grounds of exception to the judgment was, that general *Mostyn* was governor of Minorca, and, therefore, for no injury whatsoever, could any evidence be heard, and that no action could lie against him. In disposing of this objection, lord *Mansfield* said that the first point he should consider was the sacredness of the governor's person, and declared that an action, if it did not

(1) Cowp., p. 161; 11 State Trials.

lie in England, against any other person, for injuries committed by them in an English colony, that is beyond seas, should emphatically lie against the governor; he proceeded in these words: "It is truly said that a governor is in the nature of a viceroy, and, of necessity, part of the privileges of the King are communicated to him, during the time of his government; no criminal prosecution lies against him, and no civil action will lie against him, because what would the consequence be: why, if a civil action was brought against him, and a judgment obtained for damages, he might be taken up and put into prison on a *capias;* and, therefore, locally, during the time of his government, the court, in the island Minorca, can not hold pleas against him." It is not considered that the governor of Canada is above the law, the King himself neither has or pretends to any such privilege; the imperial "*sic volo, sic jubeo, stet pro ratione voluntas,*" neither is or ought to be the maxim of an English King or of his representative. A governor of Canada cannot be guilty of any act of either public or private oppression with impunity, his removal and punishment would follow, as a matter of course, any such dereliction from the path of his duty. It is, however, of the very essence of the British constitution, for the sake of unanimity, strength and despatch, that such powers as have been enumerated, should be entrusted in a single hand. It is a principle that, in the exercise of lawful prerogative, the King is and ought to be absolute, there is no legal authority that can either delay or resist him; so, in the exercise of his delegated authority, a governor is and must be absolute, nor can any power within the colony delay or resist him. This doctrine, it is contended, is neither dangerous or inconsistent with English ideas of liberty; civil liberty, as understood under the British constitution, consists in protecting individuals by the united force of society, that protection cannot be afforded, nor society maintained, without obedience to some one individual invested with sovereign power, whose person must be sacred, and that individual, in this country, is His Majesty's representative.

AHERN, for the Plaintiff: If this plea can be maintained, there exists in this community, a person not amenable to the laws, and possessing powers more than dictatorial, claiming not only the prerogatives of the King, his master, but privileges greater than those of the monarch. We, every day, hear the governor called the King's representative, and the Defendant, in this cause, has allowed himself to be led away by this; nothing is more inaccurate than this expression, in the sense in which it is used. "Constitutionally, the King is the founder of all office, honour and power, and each officer of the govern-

ment, deriving his authority from the King, represents the King in the exercise of his legal power, this is as true of the highest as of the lowest officers, it is as true of a constable, as it is of the lord chancellor of England. In no other sense, can it rightly be applied to the governor of a colony. None of the particular attributes of sovereignty, under the constitutional laws of England, are applicable to that officer. The King can do no wrong. Is that true of a provincial governor ? his powers are originally inherent and perpetual ; that of a governor is derivative, temporary and dependent upon the will of him who conferred it. Constitutionally, the King is answerable to God only for his acts. The governor is answerable to his royal master. The King is amenable to no human tribunal, for the discretion which he exercises, in the execution of the functions of his *public* duty. The governor is answerable to the King and to his courts, for every act by him performed ; the privileges of the King are personal, and cannot be delegated ; the governor is but the minister or servant of the King, and cannot pretend to any privilege beyond his personal liberty. The maxim that the King can do no wrong is a necessary and fundamental principle of the English constitution, meaning only, that, in the first place, whatever may be amiss in the condnct of public affairs, is not chargeable on the King ; nor is he, but his minister, accountable for it to the people ; and, *secondly*, that the prerogative of the Crown extends not to do any injury, for, being created for the benefit of the people, it cannot be exercised to their prejudice. The subject, in England, has recourse against the King, if any of his private rights are invaded, by petition of *right or monstrans de droit*, upon which execution may issue. (1) Shall then a governor of a province claim exemption from a process to which his royal master is amenable ? Shall he who shines with a borrowed light, claim privileges greater than those belonging to him from whom he derives his temporary grandeur ? This question must be decided by the *lex loci*, where the ground of action arose ; in this instance, it is the old law of France, and it may be asked if the king of France could not have been brought before the courts of justice, in Lower Canada ? It appears that he could, and no where is this more clearly stated than in the *Discours sur l'étude de la Procédure*, in the preface to the *Procédure civile du Châtelet de Paris*, 40 and 41 : " Notre gouvernement a toujours regardé comme une de ses principales obligations de ne pas gêner l'exercice des actions qu'un citoyen croit avoir droit de diriger contre un autre : de sorte que l'on peut, en France, traduire en justice, sans aucune permission, les gens

(1) Chitty, 348-9.

les plus élevés, même le *souverain*, lorsqu'on prétend ses droits portés au delà de leurs bornes légitimes par ceux qu'il a chargés d'y veiller. " Thus, not only was the king, in France, answerable for the wrongs done to his subjects of a private nature, but, also, for those committed by his servants, when they exceeded the powers legally vested in him. An opinion of lord *Mansfield*, in the case of *Mostyn* vs. *Fabrigas*, has been cited, " that, locally, during his government, no action will lie against a governor ; because, upon the process he would be subject to imprisonment ; " such may be the law in England, and such appears to have been the law at that time in Minorca, where the ground of action, in the case above alluded to, originated ; but such is not the law in this province, and it does not here follows, as a matter of course, that, upon process, the party is subject to imprisonment, *cessante causâ, cessat effectus*, that being the only difficulty in the way, and that difficulty being removed, there is no disability incapacitating the Plaintiff from seeking redress here ; and, further, as the present action is a purely personal action, arising from acts is no way connected with the public character of the Defendant, it is clearly maintainable in this country, and the question of prerogative or not prerogative cannot, stricly speaking, be taken notice of by the court. The exception ought to be dismissed ; should it be otherwise, I fear the public, with too much truth, will apply the lines of the Roman satyrist, on the drunken *Marius* to the present occasion ; and they will say of the Defendant in this cause (for setting up such a defence), as was formerly said of him, *hic est damnatus inani judicio*, and if this court maintains the present exception, well may the colonists exclaim: *At tu victrix provincia ploris*.. And, then, indeed, will I begin to believe that which was said of the Roman colonies, viz.: that a colony is better governed, when the metropolitan state is subject to a despotic government, than when under a free government for each governor of a province being a petty tyrant, the colonists cannot obtain a sufficiently speedy relief by the tardy forms required under a free government: whereas the despot, jealous of others, upon the first complaint, removes the imitator, and the only hope a governor has under such circumstances, of maintaining his post, is to secure the affections of the people.

Thus far on the merits, now, as to form: this plea ought to be dismissed, 1. Because the Defendant has not produced or fyled his commission, and the Defendant in this cause is liable to the same rules of pleading as any other Defendant ; and, if he sets forth, in his plea, a written instrument, he must produce it. Now, as to the sacredness of the Defendant's person, as governor, if it were true that the law makes him that sacred

character, he must plead it, and set forth his commission, as special matter of justification, because, *primâ facie*, the court has jurisdiction, and, if the Defendant in this cause has not produced and fyled his commission, the same rules apply to him as to the others, *de non apparentibus et de non existentibus, idem est jus.* 2. Because, in every plea to the jurisdiction, the party pleading must shew a more proper and a more sufficient jurisdiction.

BOWEN, in reply: It has been admitted that the Defendant is priviledged from arrest, and that his person is sacred; now, in admitting this, the Plaintiff admits the truth of my proposition; for, if his person is sacred, he can, with impunity, resist the process of the court, and is, therefore, not subject to its jurisdiction. It has been said, however, that according to my statement, the Defendant possesses powers and privileges which the King himself does not possess, and, therefore, cannot delegate, and that, by Magna Charta, the petition of right is secured to the subject. It is true that, in England, the subject is entitled to a petition of right, but it is not true in this country, (1) nor is there any proceeding here in any way analagous to the petition of right by which a governor can be sued. It is of the very essence of the petition of right, that it should contain nothing of a mandatory nature, and the writ of execution, if necessary, is issued, directed to His Majesty's treasurer and chamberlains, who, if they neglect to satisfy the judgment, out of the first monies that come into their hands, are held personally liable, for, if the court had not the power of enforcing the judgment, the petition of right would be perfectly useless. It is contended that this action, if successfully prosecuted to judgment, would not give a right of *capias an satisfaciendum* to the Plaintiff, it would certainly give a right of seizing the Defendant's effects, who could resist the execution of the judgment with impunity, because the court cannot commit him for contempt. The citations from the French law are not binding here, because it is a question of prerogative to be decided by the law of England. As a part of lord *Mansfield's* judgment, in the case of *Fabrigas* vs. *Mostyn*, has been used as an argument against me, I mean that part of it which alludes to the omission of general *Mostyn's* counsel, in not filing his commission in support of the allegation, that being governor of Minorca, he was not answerable for any injury done by him in that capacity: I shall explain the difference between them: Lord *Mansfield* was undoubtedly right in his view of that point, the King's courts, in En-

(1) V. art. 886*a* à 886*o* inclus. C. P. C. et le ch. CXXXVI des S. R. C. *l'acte des pétitions de droit.*

gland, could not know that general *Mostyn* had been governor of Minorca except by the production of his commission, for the action was not brought within the limits of his government: the situation of the court, in the two cases, is not at all similar, for the court here is bound to know and obey the governer of the province. The constitutional checks upon the power of governors of colonies, have hitherto proved sufficient, and, when it is considered that, upon their recall, governors are no longer protected from the process of the King's courts, but are answerable, not only for their debts, but, also, for any abuse of their delegated authority, the apprehension that might be entertained from entrusting them with such powers as I have contended they possess, and of investing them with such important privileges, must be entirely removed; any slight inconvenience that an individual may suffer is much more than recompensed by the public peace and security of government which is found under our present constitution.

SEWELL, CH. J.: If there were any room to doubt the validity of the exception which has been filed, on the part of the Defendant, we should certainly be disposed to put this case *en delibéré*, but, as there is none, and the question submitted has received a judicial decision on several occasions, and has been, for some time, pending before us, we think it right to deliver our opinion without further delay. It is not for courts to enquire whether the rule of law, in any particular instance, be or be not wise or politic, it is sufficient for them that such is the law, and, as they find it, so they are bound to declare it. The question which we are now required to decide is singly this: whether an action can be maintained against the governor of a province, while he is in the administration of the government, as the representative of the sovereign? and we must say that an action cannot be so maintained, because we are satisfied that such is the law. The decision, on the case of *Fabrigas & Mostyn*, is well known, and is sufficient, even alone, to determine this question. *Fabrigas*, for a civil injury done to him by *Mostyn*, at Minorca, while the latter was governor of that island, instituted an action of damages, *in England*, against *Mostyn*, and, in his defence, it was contended that *Fabrigas* ought to have prosecuted his suit in Minorca, but it was answered that, *Mostyn*, being the governor, no action against him could be sustained in Minorca, and, on this ground, the action instituted in England was maintained. In delivering the judgment of the Court of King's Bench, lord *Mansfield* declared the law upon the question before us in the following explicit terms: "It is truly said, that a governor is "in the nature of a viceroy, and, therefore, locally, during his "government, no civil or criminal action will lie against him."

(1) In the case of *Van Dam*, against *Crosby*, governor of the late province of New York, cited at the bar, this principle was recognized by the supreme court of that province, and the cross action instituted by *Van Dam*, in consequence thereof, failed. So, in the case of the celebrated *Napper Tandy*, vs. *the Earl* of *Westmoreland*, which was instituted in the Court of Exchequer of Ireland, in the year 1792. The Earl, being then the lord lieutenant, was summoned by writ of subpœna to appear and answer. The attorney general moved that Their Lordships would be pleased to quash the subpœna, and prohibit further process. BUTLER, of counsel for the Plaintiff, in answer, contended, as it has here been contended, that the court had no judicial cognizance: that the Earl of *Westmoreland* was lord lieutenant of the kingdom. The court, however, were of opinion that they held the fullest judicial knowledge of His Excellency's authority, as lord lieutenant of Ireland, in a degree which made it absurd to doubt. They saw him, in parliament, acknowledged by both houses; they saw him ministering in all the functions of His Majesty's representative, and acknowledged by the whole kingdom to be such. "Then," said the court, "where is there a shadow of doubt, there can "be none, and, knowing and seeing all this, *de facto*, as we do, "we have nothing to do with speculations *de jure*." The motion of the attorney general, on account of its being the last day of term, was continued to the next term, but it was ordered that no process should issue, in the mean time, against the Earl of *Westmoreland*, and here the matter dropped. We are informed, in a way which leaves no room to doubt, that a decision similar in its effect to those which have been cited, has lately been given in a neighbouring province, but, as the particulars of the case, are imperfectly known, we can make no further use of it at present. (2)

Upon the whole, we are of opinion that the exception must be maintained, and the action dismissed, *quant à présent*.

KERR and BOWEN, JJ., expressed their assent to this opinion

PANET, J.: I do not concur with my brethren on the bench, not being fully prepared, at this moment, to pronounce an opinion upon the question which has been submitted to the court. (*Stuart's Rep.*, p. 542.)

(1) Cowper's *Reports*, p. 172.

(2) The case here alluded to was that of the Honble. Mr. Black, a merchant in the province of New Brunswick, and the senior member of the council. He was, a few years since, the president of that province, and when he became president, two or more actions, in which he was the Defendant, were pending in the supreme court. These actions were all suspended by that court, and, during the period of his presidency, no proceedings were had in them.

PROCEDURE.—LITISPENDENCE.

COURT OF APPEALS, Quebec, 29th July, 1833.

On appeal from Montreal.

HECTOR RUSSEL and others, Appellants, and WILLIAM FIELD, Respondent.

Held: That litispendence in a foreign state is no bar to an action instituted in this province. (1)

An action was instituted by the Appellants against the Respondent, to which was pleaded the pendency of another suit, between the same parties, and for the same cause of action, in the state of *Vermont:* This plea was maintained by the judgment of the court below, which gave rise to this appeal.

The grounds upon which this judgment was impugned were, that, whether such respect should be shewn to litispendence in a foreign country, as to suffer it to bar or suspend a suit, is a question of public law, and, so, must be decided by the laws of England, as a paramount authority, throughout the empire. According to the principles of English jurisprudence, litispendence in a foreign country, or even in one of the colonies, could not be pleaded in any way to an action in the courts of Westminster Hall. (2) Upon the supposition that this were a case to be governed by the practice of the French courts, litispendence in a foreign country could not be pleaded, as France was distinguished from most of the states of Europe, by her shewing no regard for foreign jurisdiction. (3) Viewing the plea of litispendence abroad, in its true light, as ascertained by force of obligation, but *ex comitate*, the basis of that comity, which is reciprocity, would fail in the present instance, as in the state of Vermont, and the other United States of America, litispendence, in a foreign country, or even in a sister state, cannot be pleaded to an action brought there. (4)

PER CURIAM : According to French authorities, this appears to be a question of public law. In France, foreign judgments had no effect. (5) It was a part of the public law which

(1) V. art. 42*a*, 42*b*, 42*c*, 42*d* et 136 C. P. C.

(2) 3 Atkyns, 587.

(3) Kluber, *Droits des gens modernes de l'Europe*, I, 97 ; Ord. 1629, art. 121 ; Merlin, *Q. de droit*, verbo *jugement*, § 14, 19 ; Emerigon, *Des assurances*, L., 125.

(4) 9 Johns. *Rep.*, 221 ; 12 Johns. *Rep.*, 99.

(5) 10 Toullier, 143 et seq.

might be regulated by treaty, not dependant upon comity. This principle has been maintained by the *Napoleon Code*, and a modern French *arrêt* has declared that litispendance in a foreign country is no bar to a suit. The case cited from *Atkins*, went to support the same doctrine. It has been made a grievance in this case, that two arrests had taken place, but an answer to this would be found in the case of *Maule* vs. *Murray*, (1) where it was held, that a Defendant who had been arrested in America, might be again arrested in England, for the same cause of action.

BUCHANAN, for the Appellant ; W. K. MCCORD, for the Respondent.

Judgment reversed. (*Stuart's Rep.*, p. 558.)

COMMISSIONERS FOR THE BUILDING AND REPAIRING OF CHURCHES.—CERTIORARI.

COURT OF APPEALS, Quebec, 29th July, 1833.

On appeal from Three Rivers.

OUR SOVEREIGN LORD THE KING, ex relatione THOMAS COFFIN and others, Appellant, and MAGLOIRE GINGRAS and others, Respondents.

Held : A *certiorari* will lie for excess of jurisdiction and illegality in the proceedings of commissioners appointed by the governor of the province under the ordinance, 31st Geo. III, ch. VI, for the building and repairing of churches. (2)

In this case, the principal subject of controversy related to the place where the new church of the parish of *St. Pierre les Becquets*, which was admitted by all parties to be required, should be placed ; certain parishioners, being desirous that it should be on or in the neighbourhood of the site of the present church, in the first concession of the parish, others, again, contending that it ought to be placed in one of the rear concessions. An essential element in this enquiry, it was argued on the part of the Opposants, would be in the will of the majority of the parishioners, and in the relative proportion of that majority to the minority of the parish. It was understood that this had been so considered by the ecclesiastical authorities. But the Opposants to the proceedings of the commissioners were under the impression that, as well the commissioners themselves, as the ecclesiastical authorities, had been led

(1) 7 T. R., 470.

(2) V. art. 1220 C. P. C.

into error on this point, by a series of illegal proceedings giving to the minority of the parish, the appearance, of being the majority, and, at the same time, of such irregularity as to vitiate and render null the assessment, and all matters connected therewith. The grounds stated in the petition of the Opposants were various alleged irregularities, in the notice for the meeting, in the nomination of the syndics, in the making of the assessment, and in the establishment of the site of the church. The prayer was for a *certiorari*; this, the Court of King's Bench at Three Rivers ordered, and from this order the appeal was instituted.

SEWELL, CH. J.: A *certiorari* does not go to try the merits of the matter in issue, but to see whether the limited jurisdiction has exceeded its bounds, and the jurisdiction has of the Court of King's Bench as to the writ of *certiorari* is not at all affected by any statute which does not take it away, in express terms. These points are so peremptorily settled, that a clause, in a statute, which enacts, "That no other court whatsoever shall intermeddle with any cause or causes of appeal, but they shall be *finally* determined in Quarter sessions only," were held, in the case of *Rex* vs. *Moreley* (1), to mean no more than this, "that the facts shall not be re-examined," and, consequently, it was, in that case, determined that the legality of the proceedings of certain magistrates, in the exercise of a limited jurisdiction, vested in them by the statute, might be heard and determined in the Court of King's Bench by *certiorari*; and, it is, in fact, obvious, that these principles must be well founded, for, if it were otherwise there could be no such thing as a limited jurisdiction. (2) In the present case, an application for a writ of *certiorari*, upon the ground of excess of jurisdiction, and illegality in the proceedings of the commissioners for erecting churches in the district of Three-Rivers, has been allowed by the Court of King's Bench, and, from the allowance of that writ, this appeal has been brought. 1° Because the commissioners are, under virtue of the especial provisions contained in the ordinance, 31st Geo. III, ch. VI, appointed by the governor, and that he only can enquire into their conduct; 2° Because the powers exercised by the commissioners are legislative powers. Now, admitting that the governor has an appellate jurisdiction over the decisions of these commissioners, that would go to the merits of the questions before them, while the *certiorari* allowed by the King's Bench can only go to their jurisdiction, and it has been settled that the existence of an appellate jurisdiction does not, in any

(1) 2 Burroughs, 1042.

(2) See *Groendelt* vs. *Burrell*, 1 L. Ray, 213,252.

case, take from the Court of King's Bench the right of proceeding by *certiorari*. (1) If it could be even made to appear that the governor might proceed upon appeal, or by *certiorari*, to determine the limits of this particular jurisdiction, his authority, in this respect, would be no more than a concurrent jurisdiction with that of the Court of King's Bench, for, there is not a word, in the ordinance, which can affect the jurisdiction of the King's Bench, or the authority which that court possesses to proceed by *certiorari*. It has indeed been argued that the governor may exercise in person the power which he has delegated to the commissioners, and that, in such case, no *certiorari* could be issued. But it is not necessary for us, at present, to enquire what could or could not be done by the Court of King's Bench, if the governor should see fit to do so. This is not a case in which the governor has exercised in person the jurisdiction created by the ordinance; far from it, it is one which has relation only to the exercise of that jurisdiction, by certain commissioners appointed to carry it legally into effect, and, as a *certiorari* does lie in the case of justices of the peace, who are appointed by the King to carry into effect the powers, which, with respect to their jurisdiction, are by law vested in His Majesty; so, *a fortiori*, a *certiorari* may issue to commissioners appointed by the governor, to carry into effect the powers which are vested in him by the ordinance for the erection of churches. It would, however, be a strong argument against the exercise of these powers by the governors in person, if it should hereafter be made to appear, that no *certiorari* can issue, even from His Majesty's supreme courts of law, to restrain a governor in the exexcise of a limited judicial authority. The remaining ground for this appeal alleges, that the powers held by the commissioners are of a legislative nature, inasmuch as they enable them to assess a tax on the inhabitants of parishes for the erection of churches; now, if they be so, the power held by the justices of the peace, in England, which makes them to assess the tax for the support of the poor, must be of the same description; and, yet, the writ of *certiorari* lies, and is daily issued in such cases, (2) and this is a manifest proof that the powers so exercised are not legislative in either case. In fact, the tax, in both instances, is imposed by the legislature, and the authority exercised by the church commissioners is confined to the calculation and distribution of the amount required for the erection of a church, in any particular parish, among the

(1) *Rex* vs. *Moreley*, supra.

(2) *Rex* vs. *Midland*, 1 Burr., 576; *Rex* vs. *St. Luke's Hospital*, 2 Burr., 1053.

parishioners upon whom it is already imposed by law; just as the authority exercised by the magistrates, in the assessment of the poor rates, in England, is confined to the calculation and distribution of the amount required for the support and maintenance of the poor of any particular hundred or parish, among the persons upon whom the tax is by law already imposed. Upon this view of the case before us, this court is of opinion, that the writ was rightly allowed, and the judgment of the court below is, therefore, confirmed with costs. *(Stuart's Rep.*, p. 560.)

RIVERS.

COURT of APPEALS, Quebec, 16th November, 1833.

On appeal from Quebec.

NICOLAS BOISSONNAULT, Appellant, and JAMES OLIVA, Respondent.

Held: That rivers, whether navigable or not, are vested in the Crown for the public benefit, and no person, seigneur or other, can exercise any right over them without a grant from the Crown. (1)

In an action of damages, by the stopping of communication, on a navigable river, with a boom and chain, it appearing from an agreement between the parties, after the commencement of the suit, that the placing of the boom and chain tended to their mutual benefit, the action was dismissed. (2)

The Respondent, Plaintiff in the court below, instituted an action against the Appellant, for damages alleged to have been occasioned by the Appellant's stopping up the communication, on a public navigable river, called the *rivière du Sud*, by means of a certain boom and iron chain; whereby certain saw logs and pieces of timber belonging to the Plaintiff, were stopped, and prevented from arriving at his saw mills, at *St. Thomas*, to his damage £2,000.

REID, CH. J.: The Appellant, by his plea, admits the placing of the booms and iron chains on the *rivière du Sud*, but denies that it is a navigable river: on the contrary, he alleges that it is not navigable, but the property of the adjoining seigniors, whose permission he has to erect the boom in question, and to maintain the same: and, by the general issue, denies the facts stated in the declaration. Testimony has been adduced to a very considerable extent, to shew the waters of this *rivière du Sud*, the difficulties and

(1) V. art. 400 C. C.

(2) V. la cause de *Oliva* vs. *Boissonnault*, supra, p. 389.

obstructions to the navigation, and the kind of communication of which it is capable. Part of the evidence adduced by the Defendant consists of an agreement made between the parties, and executed before Gagné, notary, dated 14th December, 1831, which is a document of some importance in this cause, as affecting the question before the court. Had this agreement been in existence at the time the plea was fyled in this cause, there is reason to presume it would have been set up as a bar to this action; but, as it comes now in evidence before this court, as resisting the plea of the Plaintiff for damages, we must receive it accordingly, and must hold that, in the face of such evidence, the Plaintiff cannot maintain his action. By this agreement, it appears that it was for the mutual interest of the parties that a boom should be erected with a view to prevent the loss of timber floating down this rapid stream. This fact also corresponds with the other evidence in this cause; and in order the better to enable the Defendant to keep his booms which he had erected for this purpose, the Plaintiff agrees to pay a certain proportion of the expense, and that they should remain under the controul and direction of the Defendant. The words of the agreement are: "*Cependant les frais d'entretien des booms appartenant à M. Boissonnault, sur la rivière du Sud, savoir: celui de chez Joseph Tétu, et celui du bassin de St. Thomas, seront supportés par chaque partie, à proportion de la quantité de billots qu'elles y auront ou pourront y avoir; et, néanmoins, les dits booms et tels autres booms, que le dit N. Boissonnault a sur la dite rivière du Sud, ne s'ouvriront qu'à l'ordre du dit Boissonnault.*" The Respondent here acquiesces, in the clearest manner, in the right of the Appellant to keep up these booms, without any reservation as to the present claim; he has judged his own cause, and must be stopped from claiming damages in the face of his own agreement, and, even, as respects the damages claimed, nothing is proved that would enable the court to assess them, and they cannot be ascertained by experts. It matters not, therefore, whether this river be navigable, or not navigable, *seigneuriale* or *flottable*, the consequences, as respects the damages, being the same.

Looking, however, at the right of the parties, at the time the action was instituted, we are of opinion that the Plaintiff was entitled to his action, whether the *rivière du Sud* is to be considered as *flottable* or *seigneuriale*. There may be some doubt whether this river can be considered *flottable*, as rivers of this description would appear to be ranked among navigable rivers, *portant bateaux et radeaux pour le transport du bois et autres marchandises*, and, as such were the property,

and under the protection and jurisdiction of the Crown. The *rivière du Sud* appears capable of floating only single logs, and not rafts or bateaux, from the frequent interruption of the navigation from the rocks, shallows and rapids, to be found in it, and, therefore, is not to be considered as a navigable river; but, allowing it to be of the description of *seigneuriale et banale*, the use of it, even in that case, must be free and open to the public: for, according to *Freminville*, (1) the King preserves his right over all such rivers as may be used for the floating of timber, inasmuch as he is considered to be the protector of commerce, and of the public interest. " Sa Majesté se charge de la police de ces rivières qu'il con-
" vient d'exercer pour l'aisance et la sûreté des bois flottés, à
" l'effet qu'il ne soit détourné des eaux de ces rivières, établies
" des moulins nouveaux *gourds, vannes* et autres édifices
" capables de nuire au flottage des bois, par conséquent, au
" commerce." But, if the King were not to retain this authority over a *rivière seigneuriale;* yet, the seigneur féodal cannot claim the property of these rivers, as, according to the French system, they belonged to the *seigneur haut justicier*, who was vested therewith, and exercised a jurisdiction over them; not so much for his own interest, as for the public benefit, and was said to hold them, in the same manner and for the same purpose as the King held and exercised jurisdiction over navigable rivers. In this country, the King is the sole and only *seigneur haut justicier;* and, as such, protects the rights of all his subjects in matters of this kind, which, under the French system, was intrusted to inferior officers.(2) The waters of all rivers whether navigable or not navigable, being matters of public benefit and public interest are vested in the Crown, and no man whether seignior or other can hold or exercise a right over them, without special grant from the Crown. No such grant has been ascertained to exist in the seigniors of St. Valier and St. Thomas, nor could they convey to the Appellant the right to stop up the communication on this river; but as the Plaintiff has acquiesced in the act of which he has complained, and has agreed that the Defendant shall keep up these booms as a thing beneficial to both parties; we therefore think that the judgment of the court below should be reversed, each party to pay his own costs, as well in the court below as in this court. *(Stuart's Rep.*, p. 564.)

(1) Vol. IV, ch. IV, p. 434-5.

(2) 3 Desp., 128, 129, 158, 159, 212, 213; Boutaric, *De la justice*, etc., 506, 558, 577, 578; Renauldon, *Des droits seigneuriaux*, 365, 371, 372, 391; 4 Freminville, *Prat. des ter.*, 477, 497, 498, 480; Guypape, *Quest.* 514; Bouthillier, Som. a. liv. I, ch. LXXIII; Loiseau, *Des seign.*, ch. XII, n° 120; *Dict. des arrêts*, verbo *ririère*; *Lacombe*, verbo *fleuve; Ferrière, D. D.*, verbo *rivière;* Tr. du gouvernement des biens et affaires des communautés d'habitans, 503.

CARRIERS' RESPONSIBILITY.

COURT OF APPEALS, Quebec, 28th April, 1834.

On appeal from Quebec.

JAMES SWINBURNE, Appellant, and LOUIS MASSUE and another, Respondents.

Several packages of goods were shipped, at London, to a merchant, at Quebec, where, upon the arrival of the vessel, and after delivery of the packages, it was ascertained that some of the goods were missing from one of the packages. Notice not having been given, until several months afterwards, it was, thereupon, *held* that the master was not responsible for the deficiency. (1)

Caldwell, Crawford & Co, of *London*, in pursuance of orders from the Respondents, purchased divers goods for them, which were packed in sixteen packages, whereof the case numbered 14, contained, amongst other goods, those of which the value was in controversy in this case. They were delivered at the office of *Caldwell, Crawford & Co.* by their clerk, to a carter, to be conveyed to the *London docks*. Neither the agents of the Respondents, nor any person in their employ, accompanied the goods. The clerk saw the cases and packages on the quay, about an hour after they had been put into the custody of the carter, he did not see them shipped, and did not know when they were shipped. The mate of the *Great Britain* deposed that they were regularly stowed in the hold of the ship, and that they were landed at Quebec, to all appearance, in perfectly good order, and taken away by a carter, and conveyed, by the directions of a clerk of the Respondents, to their store in the Upper Town of *Quebec;* the clerk not accompanying the carter. On opening the packages, the clerk of the Respondents found that this particular case, n° 14, dit not require the use of a hammer to open it, that it was fastened at one end by one nail only, and, at the other, by two, which offered but little resistance. The other nails appeared to the clerk to have been cut by a sharp instrument, and to have been recently done. No notice of this appeared to have been given by the Respondents to the Appellant; no survey was called, and no claim set up for the value of the goods missing, until the following season, when the present demand was made and action brought. The bill of lading contained, at its foot, the words "contents unknown."

REID, CH. J.: This action appears to have been instituted by the Respondents, merchants in *Quebec*, against the Appel-

(1) V. art. 1053 et 1674 C. C.

lant, master of the ship *Great Britain*, for the recovery of a sum of £110 15s. 10d., being the value of certain goods and marchandize said to have been shipped by their agents, at *London*, on the 15th day of August, 1831, to the Respondents, and packed in a certain case, n° 14, which, it is said, was broken open, on board the said ship, and goods and merchandize, to the above value, pillaged and removed. The Appellant has set up three points of defence to this action: 1° the want of proof that the particular goods in question were contained in the said case, at the time it was received on board the said ship; 2° the want of proof that this case, after it was delivered from the ship to the Respondents, on the wharf, at *Quebec*, was safely conveyed to the warehouse of the Respondents, and, there, deposited in the same state and condition in which it had been so delivered; and 3° the want of any notice or demand on the Appellant, for loss or damage alleged to have been sustained by the Respondents, in relation to the said goods and merchandize, until the return of the said ship to Quebec, in the year 1832. In a case of this kind, where the right of a Plaintiff rests upon the mere legal responsibility of a Defendant, where no personal fraud or collusion can be attributed to him, the latter is entitled to avail himself of every point that can either diminish or destroy that responsibility. Now, it is certain that, if the goods in question were not delivered on board the said ship, or, if there be no proof of that delivery, which, in law, is the same, no responsibility can attach to the ship or master. In like manner, if the case has been delivered, in the same state in which it was received, on board the ship, but has passed through different hands before the damage was discovered, the presumption will be in favor of the master. The court, however, does not think it necessary, in the present instance, to enter particularly into the merits of these two points, and of the evidence adduced thereon, as they consider the other point of defence, namely, the want of notice to the Appellant, after the delivery and receipt of the said case, during an unreasonable delay of several months, and after the departure of the ship from the port of delivery, as sufficient to exonerate the Appellant. As the law has attached great responsibility to the master, and makes him liable, not only for his own negligence or misconduct, but for that of others, on board of his ship, so, in like manner, it extends to him a protection, in the discharge of his duty, consistent with the responsibility he thus incurs, and the nature of the trade in which he is employed. When a ship arrives at the port of delivery, the master necessarily has many objects which demand attention and dispatch, and, as the interests of his employers require that his delay in port should be as limited

as possible so it appears reasonable and necessary for the security, of all parties, that a consignee of goods, having any cause of complaint, either as to short delivery or injury done to those goods, should notify it without delay, that an opportunity may be given to the master to make the necessary inquiries to detect offenders, if pillage has been practised on board of his ship, or to make satisfaction for the loss. An immediate examination into the facts and circumstances of the case is best calculated to ascertain the truth, and to secure the interests of all parties; and, as daily changes may occur, and the departure of the ship be uncertain, the necessity of such early precaution is strongly apparent, It is in evidence that the case in question was deliverd to the Respondents, in the same state and condition, as to outward appearance, as when received on board the ship, and when the master of a trading vessel has delivered the goods to the consignee, his duty is fulfilled, and his responsibility ceases. (1) This ought to apprize a consignee, that every instant of the time he allows to elapse, after such delivery, without objection or complaint, carries a presumption with it, in favor of the master, that the goods were safely delivered, or that no blame is to be imputed to him. But, after the deficiency here complained of was discovered, not only days, but months, were allowed to elapse, and the ship to depart before any objection or complaint was made, the Respondents in the mean time disposing of the goods, without the usual precaution of a survey and examination of their state and condition when received. To attach responsibility to the master, under such circumstances would be unjust, as he is, or may be, thus taken unprepared and unprovided with the means of defence he had in his power at the time of delivery. From the moment he delivers the packages he has received, according to his bill of lading, he is entitled to consider himself exonerated from all further responsibility, and consequently to give up any recourse he otherwise might have retained against his seamen, his passengers, or others, had he been apprized in due time of any claim or difficulty respecting what had been so delivered. It is inconsistent with the duties and obligations of the master of a ship, and would be injurious to this branch of commerce, that his responsibility should be continued for months and years after such delivery. The silence of the consignee in such a case is a presumption against him, and he cannot be allowed after so great laches to exercise a right which must inflict an unwarrantable injury

(1) Woolrich's *Com. Law.*, p. 46; Jones, *on carriers*, p. 91; Emerigon, p. 679.

on the master. The provisions of the French ordinance of 1681, on this point, are just and equitable. It directs that no action or demand can be maintained, on the part of the merchant or consignee, against the master for damages accrued to goods on board of his ship if the consignee has received them without protest. (1) This is considered to be necessary for the ease and convenience of trade and for the security of persons in it, that all contests and difficulties may be regulated without delay. The more modern commentators on this ordinance commend its decisions as of general benefit, and of great practical utility, (2) and on this particular point, one of them observes, " il est intéressant pour celui qui a une action " à former pour cause de dommages ou avarie, de faire ses " diligences à temps pour en faire constater la nature, la " qualité et l'estimation relativement aux circonstances, à " l'effet de quoi il faut qu'il fasse faire la visite des marchan- " dises ou du navire, et qu'il fasse dresser un procès-verbal de " leur état, partie présente ou duement appelée". (3) Although no decision of the English courts upon this question has been adduced, yet as the general principles of law in all commercial countries, in relation to the duties of masters of trading vessels, are drawn from the same source, have the same objects in view, and are founded in reason and justice, we must consider them as applying strongly here in favor of the Appellant, and to say that as the Respondents had received the case in question and retained it, without giving notice of the Appellant within a reasonable time, of the loss and damage complained of, they are not entitled to maintain their action against him,

The judgment of the court below is reversed, with costs to the Appellant. *(Stuart's Rep.*, p. 569.*)*

CARRIER.—RESPONSIBILITY.

COURT OF APPEALS, Quebec, 20th November, 1824.

On appeal from Montreal.

BENJAMIN HART, Appellant, and HENRY JONES and another, Respondents.

Held : That if merchandize, in good order, is entrusted to a carrier, and arrives at its destination, in a damaged state, where he holds it

(1) Ord. 1681, liv. I, tit. XII, art. 5.

(2) 2 Pardessus, n° 730 ; *Ibid.*, tom. I, n° 543 ; Poth., *Charte partie* n° 38 ; 2 Bonlay Paty, p. 325 ; Boucher, *Institution au droit maritime*, ch. XLVII n° 2508 9.

(3) Valin, liv. I, tit. XII, art. 5 and 6 in notis.

subject to freight, he is liable for the value. And if he pretends that fraud or concealment has been practised, the *onus* of proof lies upon him. (1)

This was an appeal from a judgment dismissing the Appellant's action to recover the value of three crates of earthenware from the Respondents, who were forwarding merchants, at Montreal and Brockville. Three crates belonging to the Appellant were consigned to *W. J. Bell*, of Perth, and a receipt was taken for them, from the Respondents' clerk, at Montreal, as being in apparent good order and condition. Upon the arrival of the goods, at Brockville, it was intimated to the Appellant, by the consignee, that, as part of them were much damaged, he could not receive them, but held them subject to his orders. A survey was then made, by two merchants, at Brockville, who signed a certificate of the damaged state of some of the goods. In the meantime, the Respondents intimated to the Appellant, that they held the goods subject to freight.

SEWELL, CH. J.: This is an action of damages, against a common carrier, in a boat, in the usual course. The common law of Canada renders carriers liable for damage or injury to goods entrusted to their care, unless occasioned by the act of God, or the King's enemies. This is from the edict of the Prætor. By the French law, this liability has not been carried to the same extent. It has created a third exception, viz. *force majeure*, or irresistible violence. This latter constitutes the only difference between the law of bailments, in *England* and in *France*. In all other respects, they are perfectly similar. In both countries, the law is founded on the broad principles of public policy, and, according to it, the carrier is to take as much care as a prudent man would use for his own family, otherwise he is answerable. The owner, on his part, must observe perfect good faith, if guilty of fraud, deception or concealment, the responsibility of the carrier ceases. Goods are to be put in proper condition for the journey, if not, the responsibility will also cease, but this requisite the carrier may dispense with. *Story*, in his law of bailments, states, " that the owner of the goods is bound to observe good faith towards the carrier, and to pack his goods, and to put them in a fit condition for the journey; and, if he does not, he must bear any loss arising from his own neglect. But the carrier may himself, by implication, dispense with an exact performance of part of this duty, and assume upon himself the proper care of securing the property in a fit state for the journey." (2) There is one other principle to which it is necessary to

(1) V. art. 1675 C. C.

(2) § 563. See *Beck* vs. *Evans*, 16 East's R. 245.; *Stuart* vs. *Crawley*, 2 Stark. R., 324.

advert; if the carrier pretends that there has been fraud, deception or concealment, the *onus probandi* lies on him, and he must shew that he is discharged.

These principles which have been recognized in the Court of King's Bench for this district (1) bear upon this case, and from the facts established in evidence, I think it clear that the carrier is the person who must bear the loss. The Appellant has proved the value of the goods to have been £23 5s.; that several of the crates were landed at Brockville in bad order, that when they were delivered to the Defendants they were in the very best order; to the latter fact there is the testimony of two witnesses. These gentlemen speak as to the custom at *Montreal* of the head carter of the forwarding merchant being sent to receive the goods for him, and then to examine them. Now, in addition to these two witnesses, we

(1) BORNE, against PERRAULT and another, 1821:

Held: That the owners of river craft are responsible for losses occasioned by their own want of care, attention or experience, or that of their servants.

The Defendants in this case were owners of a schooner navigating between Quebec and Montreal, and one of the Defendants, *Naud*, was the master. In April, a cargo of wheat was shipped, in this vessel, for Quebec, by the Plaintiff, and a bill of lading was signed by the master. With this cargo, and, in company with several other vessels, he proceeded in safety to the head of the Richelieu Rapids, and, as the river was there free from ice, the other vessel in company proceeded on their voyage and arrived at Quebec in safety. *Naud*, on the contrary, cast anchor and immediately, leaving the vessel in the charge of one man and a boy, went on shore to see his family. He was absent for several hours, and, during his absence, a field of ice descending the river tore the vessel from her moorings, and threw her on the shore, where she bilged and was entirely lost with her cargo.

Per Curiam: Carriers of every description are necessarily trusted by their employers with the dominion and custody of their property, and the law, therefore, for the sake of the public security, extends their responsibility to all accidents and losses, by want of due care, attention or experience, on their part, or on the part of their servants. 1 *Domat, lib.* I, *tit.* XVI, *sec.* 2, *art*, 1, 2, 3, et 4, *p.* 160; 2 *Jurisp. consulaire*, 192-3, n°s 9-10; 1 *Valin*, 373. The evidence before us, in this case, shews, in the conduct of *Naud*, the master, a great want of that ordinary care and attention which he was bound to give. He anchored in a perilous strait, without cause, and at a moment when he might have proceeded to his port of delivery in safety. He left the vessel without any necessity, when she lay in a position, which, if he had had any experience, he must have known to be one of great risk and danger, when the ice breaks up, and he left in the vessel only one man and a boy, who were not sufficient to get up the anchor, or the sails, when the field of ice was first seen descending, and, as yet, at a distance. We cannot but, therefore, attribute the loss of he schooner, and her cargo, to the fault of *Naud*, who, as one of the joint owners, must be responsible for his own misconduct and neglect, and, as he was the *préposé* of *Perrault*, the other joint owner, *Perrault* must also be responsible. 2 Toubeau, *Instit. cons.*, 280, 281, 282; 2 *Jurisp. cons.*, 192, n° 9. Judgment for the Plaintiffs. Vide *Bruneau* vs. *Cormier*, B. R. Q., 1816, n° 565; 1 Domat, 160, n° 4.

Vide Sir Wm. Jones' *Law of bailments*, p. 103. See n° 3, *Locatio operis mercium vehendarum.*

have the testimony resulting from the silence of the carter who received the goods, which affords a strong confirmation of their testimony. There is one other circumstance in evidence, that *Beckwith*, the clerk of the Respondents, after the crates were delivered to them gave a receipt stating them to be in apparent good order. When the crates arrived at Brockville, no notice of the damage was given to the Appellant by the Respondents. The consequence is, that the *onus probandi* lies upon the Respondents to prove, as they have alleged, that the damage to the crates was not occasioned by their negligence. The crates, when shipped in the Respondents' boat, were perfect, when they reached Brockville, they were injured beyond one-half, and we have no exposition of any part of the circumstances of the case which would impose responsibility upon the shipper. The only remaining question for consideration is, as to the quantum of damages. The Respondents have declared that they held the crates until payment of freight, and have disposed of them. A case very similar to this occurred in *France*, in the year 1799, reported by *Merlin*, (1) where the court compelled the Defendant to keep the article damaged, and pay the value. The only difference between the cases is, that, in the one cited, the carrier was willing to restore the goods damaged, and, in this, he was not. The judgment of the court is for the sum of £23 5s. The expenses incurred by the Appellant's book-keeper, on a journey to Brockville have been demanded, as a part of the damages sustained, but this the court considers too remote, and it cannot be allowed.

A. P. HART, and MONTIZAMBERT, for the Appellant; DUVAL for the Respondents.

Judgment reversed. (*Stuart's Rep.*, p. 589.)

CONTEMPT OF COURT.

COURT OF KING'S BENCH, Three-Rivers, 17th and 18th September, 1834

Ex parte the HON. JOSEPH RÉMI VALLIÈRES de St-Réal.

In the court of quarter sessions, a Defendant makes affidavit of his intention to remove the indictment into the King's Bench, because it involved important questions of law, and because certain of the justices were personally interested in the prosecution; thereupon, he is ordered to shew cause why an attachment for a contempt against him should not issue; this he declines, but rests his case upon the prudence and discretion of the court, he is then declared guilty of two contempts, apprehended and imprisoned; *held*, that a *certiorari* will not lie to remove his conviction. (2)

(1) Questions de Droit, *verbo* voiturier.

(2) V. art. 1220 C. P. C.

A rule was obtainod by *Polette*, on behalf of the Hon. *Joseph Rémi Vallières de St-Réal*, resident judge for the district of Three Rivers, for a *certiorari* to His Majesty's justices of the peace for the district of Three Rivers, commanding them to send, under their seals, before this court, all convictions, sentences and judgments rendered by them, or any of them, against the applicant, returnable on the 20th instant. The documents fyled in support of this application were: 1° An affidavit of the applicant, dated 13th Sept. 1834, in which it was stated that an indictment was found against him and *William Henry Vallières de St-Réal*, on the 11th July last, for a nuisance, before *Joseph Badeaux*, acting as a justice of the peace for the district of Three Rivers, and *Benedict Paul Wagner*, and *James Dickson*, justices of the peace for the same district, then holding, or pretending to hold the court of general quarter sessions of the peace. That, on the 20th of same month, the deponent appeared personally before the court of quarter sessions, and moved, upon an affidavit, then fyled, that a day might be assigned, on the first day of the then next sessions, to plead to the said indictment, which motion was granted, and the said affidavit, bearing date the 12th day of July, the deponent averred to contain the truth. That, on the said 11th day of July, the said *Joseph Badeaux* was not by law qualified to act as a justice of the peace, and that, then and since, he was and is inimical to the deponent, and determined to vex, harass and oppress the deponent, under color of justice, and the powers unlawfully assumed by him as a justice of the peace. That, on the 16th of the same month, the said *Joseph Badeaux*, *Benedict Paul Wagner*, and *James Dickson*, acting or pretending to act as justices, as aforesaid, adjudged the deponent to be guilty of a contempt, as well in making and fyling the said affidavit, as in refusing to shew cause, in justification of himself, and then condemned him to imprisonment for the space of one hour. That the deponent believed the said *Joseph Badeaux*, *Paul Benedict Wagner* and *James Dickson*, to have been actuated by malice in pronouncing the said condemnation, and that they had not, at any time, any reasonable or probable cause to suppose him guilty of any contempt. 2° A copy of the indictment above referred to. 3° The *affidavit* referred to in the foregoing affidavit, to the following effect: " That, at, or about the time laid in the said indictment, the deponent did cause and procure the road or King's highway in the said indictment mentioned, to be widened and made straight or nearly so, in such manner that the said read was made to run across the land of *Mary Ann Esther Nelson*, whose agent he is, and then was, and who,

then, represented and now represents some one of the persons across whose lands the said highway is directed and ordered to be opened by the *procès-verbal*, of the said highway, dated the fourth day of October, 1799, and homologated by this court, on the twenty-eighth day of the same month. That, in widening and rectifying the said highway, the deponent also removed the same, conformably to the said *procès-verbal*, to the distance of more than fifty feet from the precipice, or banks of the river *St. Maurice*, and that, previous to and until the aforesaid acts of this deponent, the said highway did run in a curve and oblique line, over the said land of the said *Nelson*, and, at a less distance than fifty feet at one place, or more, from the precipice and bank of the river *St. Maurice*, and without any railing, contrary to the said *procès-verbal*, and to the rights of property of the said *Nelson*. And this deponent further saith that his aforesaid act were done by him in concert with *William Kent*, the proprietor of the adjoining land, and representing *Moses Hart*, also named in the said *procès-verbal*, which the said *William Kent* had long before requested, and did then request this deponent to make the said highway straight from curve and oblique, and promised this deponent to open the said highway on his land, so as to correspond with the highway so widened, rectified and removed by this deponent, which promise the said *William Kent* has accomplished in part. That the aforesaid acts of this deponent are the same for which he now stands indicted in this court, as for a nuisance. That the said highway, across the land of the said *Nelson*, has been rendered, by the said acts of this deponent, and is now, in consequence of those acts, wholly conformable and agreeable to the requirements of the said *procès-verbal*, and of the road act, 36 Geo. III, ch. IX, which before it was not. And; lastly, this deponent saith, that *Benedict Paul Wagner* and *James Dickson*, two of the sitting magistrates in this court, are proprietors of lands lying contiguous to the said highway, and are personally and especially interested therein. Also, that several justices of the peace residing in this town are the personal enemies of this deponent, and prejudiced against him, and that, in his defence, on the said indictment, involving important questions of property and other difficult questions of law, this deponent is apprehensive full and equal justice would not be done in this court, between our lord the King and himself, and he is therefore resolved to sue out a writ of *certiorari*, without loss of time, for removing the said indictment into his Majesty's Court of King's Bench for the district, in order that his trial thereon may proceed in that court." 4' An order of the court of quarter sessions, bearing date the 14th day of

July, 1834. Present, *Joseph Badeaux, Benedict P. Wagner* and *James Dickson*, and signed by the two latter, whereby it was ordered that the said *Joseph Rémi Vallières de St-Réal*, do shew cause before this court, on the sixteenth day of July instant, at eleven of the clock in the ferenoon, why he should not be proceeded against by this court, as to law and justice may appertain, for a contempt of this, the said court, for having, in a certain affidavit fyled and put on record by him, the said *Joseph Rémi Vallières de St-Réal*, in the said cause, made, inserted the following woods, and expression, to wit: " And lastly the deponent saith that *Benedict Paul Wagner* " and *James Dickson*, two of the sitting magistrates in this " court, are proprietors of land lying contiguous to the said high- " way; and are personally and especially interested therein; " also that several justices of the peace residing in this town " are the personal enemies of this deponent, and prejudiced " against him; and that, in his defence, on the said indictment, " involving important questions of property, and other difficult " questions of law, this deponent is apprehensive full and " equal justice would not be done in this cause, between our " sovereign lord the King and himself." Whereupon, the said *Benedict Paul Wagner* and *James Dickson*, two of the sitting justices, here now personally present, desire and order that the following statement and declaration by them made and signed, and now openly read in court, be fyled of record in the said cause, and inserted in the register of this court. " We " the undersigned justices of the peace, in and for the district " of Three Rivers, and sitting justices in the said court, on " the twelfth day of July instant, when, in a certain cause " then before the said court, between our sovereign lord the " King, and the Hon. *Joseph Rémi Vallières de St-Réal*, for " a nuisance, the said Defendant fyled an affidavit, setting " forth that we were personally and especially interested in " the highway then and there in question, do now say and " aver, here, in open court, that we are in no wise interested " in the issue of the said cause, but, on the contrary, free and " unbiased in our sentiments, both as individuals and as " justices of this court." 5° The following entry, in the same case, dated the 16th day of July, 1834: " The said *Joseph Rémi Vallières de St-Réal* appears personally in court, and, being asked what cause he hath or can show, why the rule made on Monday the fourteenth day of July instant, should not be made absolute? He answered and saith, that he doth not deem it necessary or proper to show any cause upon the said rule, and that he rests his case upon the discretion and prudence of the court. The said *Joseph Rémi Vallières de St-Réal* then withdrew. The court then adjourned for one

hour, *eodem die*, at twenty minutes past, and after twelve of the clock noon." 6° An order of the court of the same day, present the justices above named, whereby it was adjudged that the refusal of the said *Joseph Rémi Vallières de St-Réal*, to show cause upon the said rule, was an additional trespass and contempt, by him committed in the face of the court; and moreover, that the said rule should be made absolute. It is therefore adjudged that the said *Joseph Rémi Vallières de St-Réal* was guilty of a trespass and contempt, by him committed in the face of the court, as well on the twelfth day of July, instant, as on this day; and, thereupon, all and singular the premises being seen and fully understood by the court, it was considered that the said *Joseph Rémi Vallières de St-Réal* be forthwith apprehended in his body, and be imprisoned in the common gaol of this district, for and during the term and space of one hour, and that upon the expiration of the said term and space, he be discharged.

A. STUART was heard, in support of the rule, and H. JUDAH, and WAGNER in person, contra.

The points made for the applicant were in substance: 1° that the affidavit complained of appeared to have been fyled in the regular course of a judicial proceeding, and involved no reproach or disrespect towards the court of quarter sessions, and did not appear to be accompanied by any circumstance changing its intrinsic character, nor was it found by the quarter sessions to have been produced for a contumelious purpose, nor indeed for any other purpose than that for which it has relation; 2° that, so far as the alleged contempt in the affidavid is concerned, no circumstance is found *dehors* the affidavit to give to the words therein a contemptuous import, which of themselves they have not; and that the finding of the contempt was therefore without premises, and the conviction irregular and insufficient upon its face; 3° that the same objections lay as to the alleged contempt in not shewing cause, etc.; 4° that, if the foregoing propositions were true, then, the court of quarter sessions had exceeded its jurisdiction, and that the proper remedy was as here, by *certiorari*. If contempts be an exception to the general rule, that *certiorari* shall lie in all cases of summary conviction, where an inferior court exceeds its jurisdiction, unless taken away by statute, or unless there be a subsisting right of appeal from the conviction; then, it was for the party supporting the conviction to shew such exception which could not be done; on the contrary, all the authorities went to shew, that, on a conviction for a contempt by an inferior court, if such conviction did not shew wherein the conviction consisted, the conviction was bad, which proves that the

superior court can inquire and determine whether the facts found amount to a contempt or not, and that the case in *Ventris*, (1) and cited in *Viner* as law, was in point. The celebrated case of *Bushel* (2) might also be referred to, where the commitment, by a court of oyer and terminer, of a juror who was fined forty marks, by reason of his verdict in a criminal trial before that court was considered as a nullity and the party discharged upon *habeas corpus*. That the case of *The King* vs. *Woodland* (3) went some length to shew that when the sessions had stated all the facts particularly, and drawn an improper conclusion, a superior court had a right to inquire into the propriety of such conclusion. 5° That, if a contrary doctrine to that last stated were maintained, and constructive contempts allowed in the inferior courts, without any power of supervision, or control on the part of the superior courts, the inferior courts could extend their jurisdiction indefinitely *ad libitum*.

SEWELL, CH. J.: We have before us an application, by motion, for a writ of *certiorari* to the court of quarter sessions of this district, to remove a summary conviction in that court, by which the Hon. *Joseph Rémi Vallières de St-Réal* was declared and adjudged to have been guilty of a contempt in the face of the court. There are various means provided by law for the revision of the proceedings of inferior jurisdictions, but of these, upon the present occasion, it is only necessary for us to refer to the writs of appeal and *certiorari*. By the former, the proceedings of the court below are brought before the superior tribunal, with the evidence on which their judgment is founded, and the judges take into consideration the facts of the case, and decide upon the merits. The writ of

(1) In an *habeas corpus* and *certiorari* for the body of J. S. who had been imprisoned for not paying of a fine of £20. set at the quarter sessions, the return was, that he being constable, and demanded by the court to present an highway, which was sworn before him by two witnesses to be out of repair, said in contempt of the court, that he would not present it; for which and certain other contemptuous words the fine was set.

The counsel for the prisoner moved that it might be fyled, which was done.

The court were of opinion, that the fine was not well set; for constables are to present upon their own knowledge, and the two witnesses, should have been carried to the grand jury; for the constable was not obliged to present upon their testimony. This court is to judge of their fines, whether without cause or to mitigate them when excessively imposed; and for the contemptuous words the return is ill, because not expressed what.

On the other side, it was prayed, that the return might be amended, for he had spoken opprobrious words; but that could not be admitted after the fyling. And, so the party was discharged. 1 *Ventris' R.*, 336; *Viner's* Abr., Contempt, C. 3.

(2) Vaughan's R.

(3) 1 T. R., 261.

certiorari, on the contrary, enables the court above to examine the proceedings of the court below, and to decide whether they are or are not correct in point of law, but does not enable them to investigate the facts. They may inquire whether the information sets forth a cause of complaint, which by law, is cognizable in the court below, and whether the proceedings against the Defendant have been such as the law requires. Whether he was duly summoned, and (if he appeared) had a day to plead, and permission to produce, and examine his own witnesses, and to cross-examine those who were heard in support of the charge; but they cannot inquire into the facts, or even, take into their consideration the merits of the case, and, therefore, cannot examine or determine whether the deductions which the court below has drawn from the facts in evidence before them are correct. In the case of *The King* vs. *Reason*, the court said: "The evidence is "*entirely and exclusively* for the consideration of the jus-"tices below," (1) and, in the subsequent case of *The King* vs. *Smith*, lord *Kenyon*, after observing that, where the magistrate who convicts, has drawn his conclusion from the evidence before him, the court above cannot examine the propriety of his conclusion, immediately adds, "for, the magistrate *is the* "*sole judge* of the weight of the evidence." (2) As we have no power to investigate the merits, in cases of ordinary convictions brought before us by *certiorari*, it must be plain, *a fortiori*, that the same rule must obtain upon convictions for contempts. In the case of *Brass Crosby*, lord chief justice *De Grey* said: "That every court must be the *sole* "judge of its own contempts." (3) And he particularly mentions commitments by the Court of Admiralty, and by the ecclesiastical courts for contempts, and observes that, even the courts of Westminster Hall never interfere with them. The case before us is thus narrowed to one point, can the court of quarter sessions commit for contempt, in the face of the court? To shew that they can, I shall cite perhaps unnecessarily, a single authority: "The justices assembled in general or quarter session, have an undoubted power to commit for any contempt in the face of the court, *for the period of their session*, for this is a power incident to every court of justice." (4) Upon these grounds, this application, cannot be granted.

(1) 6 T. R., 375.

(2) 8 T. R., 590.

(3) 11 State Tri., 337.

(4) Dickenson's Guide, 47, 48, 3rd ed., also Ch. Crim. Law, 631, and authorities there cited.

BOWEN, J.: It is scarcely necessary to add any thing to the opinion delivered on behalf of the court by the learned Chief Justice. The law of the case does not appear to admit of doubt. This court does not sit as a Court of Appeal to *revise* the judgments of the quarter sessions. Every court is by law constituted the sole judge of *its own* contempts, particularly of contempt committed in the face of the court. The authorities upon this subject are numerous and conclusive. As to the facts of the case, so far as they have been disclosed by the affidavits, in support of this application for a writ of *certiorari*, if I had an opinion to express upon them, it would be, that the affidavit made by the Defendant, in the court below, contains no offensive matter whatever; the grounds stated in it for putting off the trial are such as usually form the basis of similar applications, namely, that, upon the trial of the indictment preferred against him for a nuisance and obstruction of the King's highway, titles to lands and questions of law, intricate in their nature, will be submitted, questions which cannot so advantageously be tried in the quarter sessions as in the Court of King's Bench. The affidavit of the Defendant further states, that two of the magistrates then upon the bench of the quarter sessions, are personally interested in the road in question (a fact, however, which it would appear they have denied upon the record.) The affidavit likewise alleges that several justices of the peace residing in Three Rivers are the personal enemies of the honorable judge, and, consequently, that he could not expect to have a fair trial in the quarter sessions. This court has already considered that affidavit so made as sufficient for the purpose, and has ordered a writ of *certiorari* to remove the indictment for nuisance into this court for trial. Had I been upon the bench of magistrates, it certainly would not have entered into my mind to consider such an affidavit a contempt of court. That tribunal, however, thought otherwise, and acted accordingly. I do sincerely regret, that the honorable judge did not see fit to employ counsel, instead of appearing before the bench of magistrates in person, as well upon his application to put off the trial, as upon the rule for an attachment for contempt: had he done so, and it had been stated that no contempt was intended, instead of declining to shew cause and contenting himself by declaring, " that he did not deem it necessary or proper so to do, resting his case upon the discretion and prudence of the court;" it is to be presumed, the rule for an attachment would have been discharged. Nor, can I, even in this answer, see grounds for an attachment; nevertheless, the court of quarter sessions viewed the matter in a different light; and, as it must be allowed to be the sole judge of its

own contempts, the relief now prayed for, to remove the *conviction* by *certiorari*, cannot be granted. The motion must, therefore, be disallowed.

GALE, J.: It is not my intention, nor do I see the necessity of adding any further observations upon a matter which has been so amply dilated upon; at the same time, it may not be improper for me to express my entire concurrence in the judgment rendered, and in the opinions already adduced in support of it, by the judges who have preceded me.

Motion denied. *(Stuart's Rep.*, p. 593.*)*

ALIEN.—INHERITANCE.

BEFORE THE PRIVY COUNCIL, 2d February, 1835.

JOSEPH DONEGANI, Appellant, and JEAN ANTOINE DONEGANI and others, Respondents.

Held: That who is an alien? is a question to be decided by the law of England, but, when alienage is established, the consequences which result from it are to be determined by the law of Canada.

If an alien dies, without issue, his lands belong to the Crown, but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and, then, all the children inherit as if they were natural born subjects.

Where an alien has a son, who is also an alien, the children of the later inherit from the grand-father to the exclusion of their father. (1)

Although an act of the legislature, passed after judgment rendered in a court of original jurisdiction, may affect the rights of a party, as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment.

The VICE-CHANCELLOR: In this case, it appears that *Jean Donegani*, a native of *Moltrazio*, in Lombardy, and *Maria Galla*, his wife, who was also an Italian by birth, in the year 1794, went to *Montreal*, for a temporary purpose, and left it in 1802. They had three sons *Joseph*, *John* and *Daniel*, and a daughter *Theresa*, all of whom were born in *Lombardy*. In September, 1797, *Theresa* married. The Respondents are the three children of that marriage, and were all born at *Montreal* In 1807, *Theresa* died at Montreal. In 1809, *Jean Donegani* her father, died in *Lombardy*, and in 1815, his wife died there also, *Jean Donegani* during his residence at Montreal, acquired some real property there: he died, leaving a will and codicil professing to give all his real property to his three sons. Upon his death, his son *Joseph* took possession of all his real

(1) Par l'article 25 C. C., l'étranger a maintenant droit d'acquérir et de transmettre, à titre gratuit ou onéreux, ainsi que par succession ou par testament, tous biens meubles et immeubles dans la province de Québec, de la même manière que le peuvent faire les sujets britanniques nés ou naturalisés

property, at Montreal, and continued in quiet possession, till the year 1827, when the Respondents commenced the proceedings to recover it, which gave rise to the present appeal. The Respondents alleged that *Joseph* had taken possession of personal property belonging to his father, and real and personal property belonging to his mother, and that property also, the Respondents claimed. But it does not appear that there was any such property, or any other than the real estate acquired by *Jean Donegani* at Montreal; and the judgment that was given by the court below related only to the real estate of *Jean Donegani* at Montreal. The court, in effect, decided in favor of the Respondents, and, by a decree, dated 18th June, 1831, directed restitution of the estate to them, with all the intermediate profits. The Appellant appealed to the Court of Appeals in Lower Canada, and the judgment below was affirmed, by a decree of 30th April, 1832. From that decree, the present appeal has been brought before His Majesty in council.

It is said that the judgment complained of is wrong, because it is alleged that the law of *Canada*, at the time these proceedings took place, was not the old law of *France*, including, as part of it, the *droit d'aubaine*, and, even if that were the law, yet, under the circumstances above stated, the Respondents were not the persons entitled to inherit the real estate of their grandfather to the entire exclusion of their uncles. That the law of *France*, was, in general, the law of Canada, as one of her colonies, before its cession, cannot be disputed. It appears from the edicts of *Louis XIV*, published in *March* and *April*, 1663, that, after the company of *Canada* had ceded to the French king the colony of *New France*, called *Canada*, *Louis XIV*, appointed a sovereign council in *Canada*, giving them power "*pour y juger souverainement, et en dernier ressort, selon les loix et ordonnances de notre royaume.*" (1) But it is said the *droit d'aubaine* was no part of the French colonial law, and, to prove this, a passage from *Pothier* was quoted: "La nécessité de peupler nos colonies a engagé "nos rois à naturaliser tous les étrangers qui s'y transporte-"raient dans la résolution d'y former un établissement fixe et "durable." (2). And it is said that this passage, when taken in connection with the paragraph immediately preceding it, shews that all strangers, in French colonies, were naturalized generally, and, as of course, without the grant of letters of naturalization to individuals from time to time. But that this is not the true construction of the phrase, "*a engagé nos rois*"

(1) 1 Edits et Ordon, 23.

(1) *Tr. des personnes*, tit. III, sec. 3, vol. VIII, p. 1, éd. 1827.

is evident from the edict of *October*, 1727 (1): "Les étrangers éta-
" blis dans nos colonies, même ceux naturalisés, ou qui pour-
" ront l'être à l'avenir." And a similar expression occurs in the
third article, " autres personnes qui soient étrangers, encore
" qu'ils soient naturalisés." In the edict of *August*, 1717,
which established a company in Canada, under the name of
" La compagnie d'occident," the 23rd article is thus: " voulons
" que ceux de nos sujets qui passeront dans les pays concédés
" à la dite compagnie, jouissent des mêmes libertés et franchi-
" ses que s'ils étaient demeurants dans notre royaume, et que
" ceux qui y naîtront des habitants français du dit pays, et
" même des étrangers européens, faisant profession de la reli-
" gion catholique, apostolique et romaine, qui pourront s'y
" établir, soient censés et réputés regnicoles, et, comme tels,
" capables de toutes successions, dons, legs, et autres disposi-
" tions, sans être obligés d'obtenir aucunes lettres de natu-
" ralité." (2) There is a similar passage in the 34th article of
the edict of *May*, 1664. *Denizart* lays down the law in this
manner: " Partout où les Français ont des colonies, l'on suit la
" Coutume de Paris. Nous avons dit au mot *aubaine* que le
" droit d'aubaine n'est point aboli dans les colonies. Il s'y
" exerce en son entier à l'égard de toutes les nations étran-
" gères. Michel Etienne de Vaux, originaire français, mais
" naturalisé anglais, étant decédé en voyages, ses effets furent
" mis en dépôt à l'amirauté de Louisbourg. Sa fille les réclama;
" l'affaire portée au conseil du roi, la confiscation fut ordonnée,
" par arrêt du 13 mai 1743." (3) Their Lordships are of opinion that nothing advanced by the Appellant's counsel, has shewn that the general law of France, including the *droit d'aubaine*, was not the law of Canada at the time it was ceded to the English, and whatever might have been the effect of the proclamation of the 7th October, 1763, there can be no doubt that, since the act of 14th Geo. III, ch. LXXXIII, the Canadian law is the old French law, including the *droit d'aubaine*, and has been the law that governed Lower Canada. The cession of Canada to the English, of course, varied the law of alienage in one respect, namely, in respect of the sovereign of the country. When the King of England became king of Canada, the natives of Canada became his subjects, Canada became part of the dominions of the English Crown, subject to be governed by its local laws. Italians, and others who were born out of the allegiance of the King of England, became aliens in Canada. By the change in sovereignty, it

(1) 1 Edits et Ordon., 475, tit. VI, art. 1, 3.

(2) Edits et Ordon., 366, art. 23; *Ib.*, p. 37.

(3) Vol. IV, éd. 1784, p. 610; 12 v. Colonies françaises, § 2, 8.

happened that the law of England, and not the law of France, would of necessity determine the question, who were aliens or not. But, when the fact of alienage was established, according to the English law, the civil consequences of alienage would be determinable by the local of the Canadian law. The question then arises what was the *droit d'aubaine? Denizart* says, (1) " Le droit *d'aubaine* est un droit de la Couronne, en " vertu duquel le Roi succède aux étrangers qui laissent des " biens dans le royaume.... La seconde espèce d'*aubains* était " les personnes qui, nées dans un pays étranger, venaient s'é- " tablir dans le royaume. Les étrangers sont incapables de " succéder, et de recevoir par testament. Enfin ils sont inca- " pables de transmettre leurs successions, soit *ab intestat*, soit " par testament; si ce n'est à leurs enfants et descendans re- " gnicoles, par exception à la règle, comme on le verra § 6.... " Pour savoir si les biens qu'un étranger laisse en France, à " son décès, sont acquis au roi, par droit d'aubaine, on ne con- " sidère point s'il est décédé en France ou hors du royaume. " (2) L'usage a introduit une exception générale à la règle qui " déclare l'aubain incapable de transmettre sa succession. " Cette exception regarde les enfants et descendans de l'aubain, " nés et domiciliés en France.... Si l'étranger a des enfants " qui soient nés, les uns en France, les autres hors le royaume, " ceux qui sont nés en France habilitent leurs frères étrangers " pour succéder au père commun. Les premiers ne sont pas " recevables à opposer aux autres le vice de pérégrinité. Quoi- " que les enfants soient admis, dans les cas dont on vient de " parler, à la succession de leur père et mère, ceux-ci ne suc- " cèdent point à leurs enfants; la réciprocité n'a pas lieu à cet " égard." The same propositions are to be found in passages that have been cited to us from the *Dictionnaire des domaines*, p. 141; Lefèvre, *Traité du domaine*, *Chabot de L'Alier*, *Brodeau sur Louet*, Le Brun, and Poullain Duparc, *Principes du droit français*. (3) " Les descendants de l'aubain au " second degré, ou dans un degré plus éloigné, lui succèdent, " s'ils sont regnicoles ou naturalisés, quoique leur père soit " vivant et aubain." *Traité du domaine* de Lefèvre, speaking of the same rule, says: " Elle s'appliquera non seulement aux " enfants du premier degré, mais même aux petits enfants nés " dans le royaume, le père vivant ou mort." (4) It appears to Their Lordships, from the passages quoted, that, according to

(1) Vol. II, *tit.* aubaine, 576, 577, 580.

(2) 2 L. C. Den., 582, 589, § 6, p. 1.

(3) Vol. II, p. 20.

(4) p. 127, note b.

the *droit d'aubaine,* if a foreigner died, leaving lands in France, his lands would belong to the King, unless he had a child or other descendants born in France. If he left several children, some born in France, and others not, those who were born in France would exclude the King from taking, and the consequence was that, as he was excluded, all the children would take in the same manner as if all had been born in France, and, if the foreigner left a son born out of France, who had children born in France, in that case the grand children would inherit to the grand father to the exclusion of their father. It is said that if the grand children of *Jean Donejani* could take by reason of the *droit d'aubaine,* then the Appellant, as their uncle, ought to share with them in the same manner, as he would have done in case *Theresa* had been born at Montreal, and had survived her father. This objection seems to be an after thought; no such point appears to have been noticed in the pleadings. The Appellant relied on his title, under the will and codicil; the Respondents on their title as heirs under the *droit d'aubaine.* No authority has been cited to shew that the alien son could share with the natural born grand children, in the same manner as he could have shared with the daughter, if she had been a natural born subject. If *Theresa* had been living, at the death of her father, her children would have taken in exclusion of her. She could not share with them, and, if she could not, analogy seems to require that her brothers should not share with her children. Their Lordships, *primâ facie,* must give the judges of the court below, credit for knowing their own local law, and it lies upon the Appellant to shew, by something more than mere assertions, that the judgment complained of is wrong.

It was lastly said that, under the provincial statute, 1st Will. IV, the Appellant is entitled: (1) that act, though as-

(1) The first clause of this statute (1 Will IV, ch. LIII) enacts, in substance, "that all persons, who have, at any time, received grants of land in this province from the Crown, and all persons who have held any public office in the province, under the great seal, or the seal at arms, and sign manual of the governor, and all persons who have taken the oath of allegiance, and all persons who had their settled place of abode in this province before the year 1823, and are still resident therein, shall be, and are thereby admitted and confirmed in all the privileges of *British* birth, and shall be deemed and taken to be, and so as respects their capacity at any time heretofore, to take, hold, possess, enjoy, claim, recover, devise, impart or transmit any real estate in the province of Lower Canada, or any right, title, privilege or appurtenance thereto, or any interest therein, to have been, natural born subjects of His Majesty, to all intents, constructions and purposes whatsoever, as if they and every of them had been born in His Majesty's United Kingdom of Great Britain and Ireland, and that the children or more remote descendants of any persons of either of the foregoing descriptions who may be dead, shall be and are thereby admitted to the same privileges which such parents or ancestors, if living, could

sented to by His Majesty on the 12th of April, 1832, was not signified by proclamation, till the 5th of June, 1832. The question before us is whether the Court of Appeals below was right, in holding that the judgment pronounced in June, 1831, was right. That judgment must have been right or wrong, according to the state of the law at the time it was pronounced, and, though the provincial act may have had the effect of giving to the Appellant, as against that judgment, rights which he had not before, yet whatever may be the operation of that act, no facts appear upon the record which can enable Their Lordships to say that the Appellant has any title under it. Upon the whole, Their Lordships are of opinion that the petition of appeal ought to be dismissed with costs. *(Stuart's Rep.*, p. 605; 3 Knapp, 63.*)*

ADMIRALTY.—JURISDICTION.

COURT of KING'S BENCH, Quebec, 20th April, 1835.

RITCHIE, against ORKNEY et ux.

Held: That the Court of Vice-Admiralty exercises jurisdiction in cases of collision *infra corpus comitatus*. (1)

claim under this act." Provided nevertheless, that any of the persons above described (except females), who have not taken the oath, shall not be entitled to the benefit of the act, unless he shall have taken the same before some person duly authorized to administer it.

By the second clause, persons actually domiciled in this province on the 1st day of March, 1831, not being of the description of persons above mentioned, and who may have resided seven years continually, in this, or any of His Majesty's dominions, are taken to be, so far as respects their capacity to hold real estate, &c. natural born subjects of His Majesty, as if they had been born within this province. Provided that no one of this description of persons, (except females), who at the passing of this act has been resident in His Majesty's dominions seven years continually, as aforesaid, shall be entitled to the benefits of this act, unless within three years from and after the passing of this act, if at the said passing of the act he shall be of the age of 18 years or upwards, or if he shall not at the said passing of the act, be of the said age, then within *three* years after he shall attain the said age he shall take and subscribe the following oath: "*I do swear that I have resided seven years in His Majesty's dominions, without having been during that time, a stated resident in any foreign country, and that I will be faithful, and bear true allegiance to the Sovereign of the United Kingdom of Great Britain and Ireland, and of this province, as dependant thereon,*" and that no one of the persons described in this clause, who has not been resident as aforesaid, seven years, continually in His Majesty's dominions, shall be entitled to the benefits of this act, unless within three years after be shall have completed a stated residence of seven years, continually as aforesaid (if at the completing of such residence he shall be of the age of 18 years or upwards, or if at that time not of that age, then within three years after he shall have obtained that age), he shall take and subscribe such oath.

By the remaining sections of this statute, the mode of registering the oath, the evidence of naturalization, etc., are established. The 9th section enacts, "that after the 1st day of January, 1850, no further oaths shall be administered, or procedings had for the purpose of being naturalized under this act.

(1) V. art. 28 C. P. C.

Ritchie, master of the steamboat *Good Intent*, by a decree of the Court of Vice-Admiralty, bearing date the 9th day of December last, was condemned to pay to *Robert Orkney* and wife, owners of the sloop *John Esdale*, the sum of £118, for damages occasioned by the *Good Intent*, in running against, and sinking the said sloop then lying at anchor in the port of *Quebec*.

DUVAL moved for a prohibition, to restrain further proceedings upon the said decree.

In support of the motion, it was contended, that the Admiralty had not jurisdiction as the cause of action arose within the precincts of the county of *Quebec*, and not upon the sea (1), the courts of *Westminster* having invariably, in such cases, granted a prohibition. The motion in this case is made after judgment pronounced in the Vice-Admiralty, but, as the want of jurisdiction appears on the face of the libel, a prohibition lie. (2) It may be said, that the imperial statute, 2nd Will. IV, ch. LI, gives jurisdiction to the Court of Vice-Admiralty. But that statute applies to a case where *the cause of action has arisen out of the local limits of the Vice-Admiralty Court.* What is meant by "local limits"? if we are to understand by that expression the limits of the province of Lower Canada, then the statute does not apply to the case, for here the cause of action arose *within* the limits of the province, and within the county of *Quebec*, where this court exercises jurisdiction daily. It is impossible to define the expression "local limits" so as to give the Court of Vice-Admiralty jurisdiction in this case, nor is there any reason why it should. Why grant to a subordinate authority a power which has been expressly refused to its superior? The Court of Admiralty cannot, in England, extend its jurisdiction to such a case as the present. Moreover, this statute was passed, not with a view of conferring jurisdiction in cases in which the existing law denied it, but to remove doubts which might exist where the cause of action did not arise within the "local limits" of the Vice-Admiralty Court, and for this there is great reason, as in the case of a sailor who proceeds *in rem* against the vessel for his wages, if this recourse were denied, in most cases he would lose them. In the case of *Murphy* vs. *Wilson*, this court denied the jurisdiction of the Vice-Admiralty, because the cause of action had arisen in a foreign port, (3)

SEWELL, CH. J.: I have carefully perused the imperial

(1) Com. Dig. Admiralty E. 1; 3 Black. Com., 106; 4 Evan's Stat., 271; And supra, *Hamilton* vs. *Fraser*, 115.

(2) *Ladbroke* vs. *Crickett*, 2 T. R., 649; Cowper R., 424; Douglas R., 377.

(3) Vide *supra*, p. 126 in note.

statute, upon which this application for a prohibition to the Court of Vice-Admiralty is founded, and I confess that I find it obscure. It is, however, the duty of this court and of all courts, to carry into effect the general object of a remedial statute, in all cases to which it can be safely applied, and as it is plainly the intention of the law giver, to give jurisdiction to the Court of Vice-Admiralty in this province, in some case of collision, in which, before the statute was passed, it had no jurisdiction, and, as there is but one instance to which the jurisdiction of that court, before the statute was passed, did not extend, namely, collision *infra corpus comitatus*, the statute must necessarily be held to apply to it, so far as to give to the Admiralty a concurrent jurisdiction with the Court of King's Bench, in cases of collision happening upon the river St. Lawrence, and within the body of a county. But, I am by no means prepared to say that this court has been ousted of any portion of its jurisdiction in such cases, or that the statute intends to deprive the subject of the benefit of the trial by jury, to which he is entitled and can obtain in this court.

BOWEN, J.: There cannot be a doubt that this statute, which is intituled, "an act to regulate the practice and fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction", was passed to remedy an inconvenience which existed a short time previous, and that the intention of the legislature was to afford a remedy against the ship itself, as well as against the master, the remedy against the latter proving in many cases insufficient. Notwithstanding the words "local limits," the effect of the other words, whereby jurisdiction is given, cannot be destroyed. *(Stuart's Rep.*, p. 613.)

PROMISSORY NOTE.—TRANSFER.

COURT OF APPEALS, Quebec, July term, 1845.

The honorable ADAM FERRIE (Defendant in the court below), Appellant, and the WARDENS OF THE HOUSE OF INDUSTRY (Plaintiffs in the court below), Respondents.

Held: That, in order to vitiate the payment by the maker of a promissory note endorsed in blank, *bad faith* must be shewn; payment *under circumstances of suspicion* is not enough. The maker is only bound to assure himself of the genuineness of the signatures, and is not bound to make any enquiry.

Corporations are bound by the acts of their agents, in the same way and to the same extent as persons are.

This was an appeal brought from a judgment of the Court of Queen's Bench, for the district of Montreal, bearing date the 21st day of January, 1845.

The action was instituted by the wardens of the House of Industry, to recover from the Appellant the sum of £1000, received by him from the Respondents in loan, under the following circumstances.

The Plaintiffs, who are directors of a charitable institution, originally established by the will of the late John Conrad Marsteller (see act 58th Geo. III, ch. xv), having, in the summer of 1840, £1000 of money, which they were desirous of applying in some way, for the purpose of charity, it was agreed, between them and the Appellant, on the 6th day of June, 1840, that he should receive and invest it in the purchase of wood, to be resold to the poor of the city of Montreal, at the original cost thereof. This duty the Appellant agreed to undertake, and, on the last mentioned day, he received from Charles Lamontagne, the then treasurer of the House of Industry, the said sum of £1000, currency, for which he gave the following receipt:

MONTREAL, 6th June, 1840.

Received from Charles Lamontagne, esquire, treasurer of the "House of Industry," one thousand pounds, in loan, for which I have granted my promissory note, payable at one year from date; the said money is to be applied in purchasing wood for the poor of this city, (and to be kept fully insured against fire) the same is to be repaid in instalments of £50 @ £100, as the said wood is sold, and the whole to be paid up within one year from this date.

(Signed) ADAM FERRIE.

A note was likewise given by the Appellant to the Respondents for the same sum, which is in these terms:—

£1000. MONTREAL, 6th June, 1840.

Twelve months after date, I promise to pay to Charles Lamontagne, esquire, or order, as treasurer of the House of Industry, established in this city, one thousand pounds, Halifax currency, for value received.

(Signed) ADAM FERRIE.

For this note Lamontagne, on the same day, gave the following receipt:

MONTREAL, 6th June, 1840.

Received from A. Ferrie, esq., his promissory note, for one thousand pounds, cy., at one year's date, being for the same amount of cash, which I have paid to him as a loan from the funds of the H. of I.; also a transfer (accepted by the president, Dr. Holmes), of forty shares of the stock of the Ottawa forwarding Company, to be held as collateral security for the said promissory note of £1000.

(Signed) C. LAMONTAGNE,
T. H. I.

In addition to this, the Appellant voluntarily assigned to the Respondents, as collateral security for the repayment of

the money, forty shares of the capital stock of the Ottawa and Rideau forwarding Company, of the value £1000, currency. The money was accordingly laid out by the Appellant in the purchase of wood for the poor of the city of Montreal, but it was found impossible to realize the amount borrowed, from the sale of the wood within the first year.

At the expiration of the year for which the sum of money in question was borrowed, the Appellant was requested by the Respondents to retain in his hands, for one year longer, for the same purposes, the said sum of £1000, and it was understood that the note for £1000 might remain in the meantine in the treasurer's hands. It was, however, agreed, among the Respondents, and intimated to the Appellant, that, before the expiration of the second year, the Respondents would require a portion of the money, and that, in such case, the Appellant should retire the old note for £1000, and grant a new one, or make such other arrangements as should be required of him. This the Appellant promised to do, whenever the Respondents desired.

Lamontagne continued to be one of the wardens and treasurer of the House of Industry, until about the 27th day of November, 1841. In the month of October, 1841, Lamontagne endorsed and delivered the note in question to one Alexis Pinet, in payment of, or security for, a sum of money which he (Lamontagne) had lost to Pinet at billiards. Shortly after this, namely, about the 12th day of November, 1841, Pinet delivered the note, thus being endorsed by Lamontagne, as such treasurer, in blank, to his agent, with a request that the latter would obtain from the Appellant two notes of £500 each, in lieu of the other for £1000.

Pinet's agent accordingly, about the last mentioned day, proceeded to Ferrie's house, but not finding him within, went to the office of Olivier Berthelet, one of the wardens of the House of Industry, to whom he shewed the note, and who states that he was very much surprised at seeing it in the possession of Pinet's agent, and that he afterwards went to acquaint Dr. Holmes with what he had seen. Pinet's agent subsequently waited on Ferrie with the note for £1000, who, supposing that it was brought on behalf of the House of Industry, and to effect the proposed change which it had been intimated to him would be required, requested Pinet's agent to draw up the notes, and that he would sign them. Pinet's agent accordingly did so, giving up to Ferrie the note for £1000, and the two others obtained in lieu thereof were afterwards delivered to Pinet. One of them subsequently passed into the hands of the *Banque du Peuple*, who instituted an action thereon, and, after two trials, in each of which a

verdict was rendered against the Appellant, recovered judgment. Upon the other note, for £500, a suit is now pending, at the instance of Thomas and William Molson & Company of the city of Montreal, to whom it had been transferred by Pinet.

The Plaintiffs in the court below, after reciting in their declaration the loan of the money and the granting of the receipts and notes already mentioned, allege that the Defendant (Appellant) " undertook and promised the said Plaintiffs to pay them, the said sum of one thousand pounds, in one year, from and after the sixth day of June, one thousand eight hundred and forty-one; that at the expiration of the said year, the Defendants had not paid and did not pay them the said sum, that, since the said sixth day of June, one thousand eight hundred and forty-one, the said Adam Ferrie, without any lawful grant, endorsement, assignment, or delivery thereof, by them, the said Plaintiffs, and against their will, and without their knowledge, privity, or consent, hath fraudulently, unjustly deceitfully, and tortiously, gotten into his hands, and obtained possession of the said promissory note, and still holds the same in his hands and possession. "

The Appellant pleaded: 1st. That he had paid the sum of money and note in question, upon the order of Charles Lamontagne, the treasurer of the Plaintiffs ; he the said Charles Lamontagne, having, as such agent, endorsed the note in question, in blank, and that, on such order, the Defendant (Appellant) had given to the bearer of the said note, and in lieu and in stead thereof, two other notes for £500 currency each ; 2nd. General plea of payment.

The Appellant examined five of the wardens of the House of Industry, to whose admissibility an objection was raised at the enquête, on the ground of their being Plaintiffs in the cause, but which objection was afterwards abandoned as untenable. These witnesses may be considered as establishing the foregoing facts, and also that the Appellant, without any hesitation, and without asking any questions, gave the two notes for £500 each to Pinet's agent, on receiving back his note for £1000, and that he was not personally acquainted with the person who brought the note.

Upon these facts, the court below pronounced the following judgment:

" Considering that the two promissory notes, for five hundred pounds each, which the said Defendant, in and by his peremptory exceptions pleaded to this action has alledged to have been given and granted by him, in discharge of the sum of one thousand pounds, for which the present action is

brought, were not given or granted upon any order of the said Plaintiffs, who never consented or agreed to receive the same; it is adjudged that the Plaintiffs do recover from the said Defendant, the sum of one thousand pounds, current money of the Province of Canada, being for a like sum of money paid and advanced to the said Defendant, by the said Plaintiffs, as a loan, and, for security and acknowledgment whereof, the said Defendant made and granted his promissory note for a like sum, dated Montreal the sixth of June, one thousand eight hundred and forty, and payable twelve months after date, to Charles Lamontagne, esquire, or order, as the treasurer of the said Plaintiffs, with interest upon the said sum, from the seventeenth day of June, one thousand eight hundred and forty-two, date of the service of process in this cause, until actual payment, and costs of suit."

It was argued, for the Appellant, that the judgment in question was erroneous: 1st. Because Ferrie was a mere gratuitous *mandataire* of the House of Industry and, as such, was responsible only for misconduct or gross neglect, *crassa negligentia*; that, although the original transaction was in the nature of a contract *ex mutuo*, the liability of the Appellant in this case was nevertheless not to be measured by the ordinary rules, regulating the liability of a borrower, since, here, the loan was not for the benefit of the *borrower*, but of the *lender*. The borrower received no advantage from the loan, in fact, he was doing the work of the lenders themselves, his position, therefore being the reverse of that of an ordinary borrower, his liability must be the reverse also: To support this position the Appellant's counsel referred to 1st vol. Stair's *Institutes*, p. 259, the language and doctrine of which author were adopted by Story, *on bailments*, p. 249; Erskine's *Institutes*, p. 293; Pothier, *Traité du prêt à usage*, p. 686, n° 51, vol. II, quarto ed. A distinction has also been drawn by some writers, that the personal habits and character of the borrower were to be taken into consideration: and, in this case, the Respondents must have known the insuspicious and open character of the Appellant, and how liable he was to be deceived. Story, *on contracts*, p. 266; and, although Pothier, *Prêt à usage*, p. 686, holds that such is a mere speculative proposition, his reasoning is all in favor of a conclusion different from that at which he himself arrives. The Respondents, moreover, *requested* the Appellant to take the monies, and Despeisse holds, that, in such case, the borrower is held merely *de dolo et lata culpa*; and, that there was nothing, in the circumstances of the present case, evidencing that the Appellant had been guilty of either. 2dly. Supposing Ferrie's liability therefore determinable on the broad ground

arising out of the original contract, the judgment of the court below was wrong, but, there were other considerations which shewed clearly that the Appellant could not have avoided, even if he had wished, making payment in the manner he had done. The Respondents, in the first instance, stipulated for a *negotiable* security, that was evidence of their *intention* to transfer it, and, at the end of the year, the Appellant was told he would have to renew, or make some change on the old note. Was it then a suspicious circumstance, that this note was presented by a third party? No; besides, it was endorsed in blank, and was therefore payable to bearer, and the holder, for the time being, might have sued Ferrie on it. The doctrine now established is, that nothing but bad faith will vitiate the payment of a note thus endorsed. Formerly, it might be vitiated, if made under circumstances calculated to *rouse the suspicions of a prudent and careful man*, but this rule has been long exploded, and, now, the maker is only bound to satisfy himself of the genuineness of the endorsement. He is not called upon to make any other inquiry. Pardessus, *Traité de change*, vol. I, p. 301, n° 295, also, page 305-306; Toullier, vol. VII, p. 29; Byles, *on bills*, p. 166 and 120; Story, *on bills*, p. 493, and the cases there referred to; Dictionnaire de Dalloz, vol. III, p. 353, *verbo* paiement; Persil, *sur la lettre de change*, page 285, and Pothier, *Tr. de change*, n° 169, says it is doubtful whether the maker would not be discharged, even in case of payment to a wrong person under a restrictive endorsation; That corporations were liable for, and bound by the acts of their agents, in the same way as individuals were, could admit of no doubt. Angell & Ames, *on corpor.*, p. 249-250. And the knowledge of the corporators, or at least, those who were entrusted with the management of their business, was evidence against the corporation. *Corporation of London* vs. *Long*, 1 Campbell's *Reports*. p. 22; I vol. Phillips, *on evidence*, p. 357; Angell & Ames, *on corpor.*, p. 249-251. But there was a *third* ground on which it was apparent, the judgment appealed from was erroneous, and it was this: Supposing the question to be which of two innocent persons should suffer the loss occasioned by the act of a third: the rule was, that he must bear it, who put it into the power of the third party to occasion the loss. In this instance, the whole of the evidence went to charge the Respondents with the initiative of the fault or error. The proper remedy of the Respondents is against their own agent, and the Appellant was in no way chargeable.

For the Respondents, it was contended that the granting of the notes was a mere ancilliary or subsidiary agreement, and

could, in no way, interfere with the rights and liabilities of the parties which were to be determined by the purposes of the original contract. That such contract was one *ex mutuo*, and that there was nothing in the Appellant's position which exempted him from the hability incident to an ordinary borrower, nor could his liability be limited by any such considerations as those adverted to, by the Appellant; that the Appellant has been guilty of gross negligence, in making the exchange; that the note for £1000 had been transferred, at maturity, and this to the Appellant's knowledge, since it was proved he knew that the note was in Lamontagne's possession untransferred at maturity. That the transfer after maturity was a suspicious circumstance, and could give the holder no better title than the person from whom he got it. That Pinet was shewn to have obtained it in payment or of security for a gambling debt, that, as between him and Lamontagne, there was therefore plainly an illegal consideration; that Pinet had no title, and no transfer at all could be said to have taken place; that, consequently, the note was still to be deemed as being in Lamontagne's possession, since it had been shewn to have been illegally obtained. But the question was not under what circumstances Ferrie had paid the note, or whether the giving of the two others was a good discharge to him, for the payment of the note originally granted, but the question which the record and pleadings presented was, whether the money received by the Appellant on loan had been repaid. There had been £1000 lent, upon a mutual agreement, that it should be applied to charitable purposes, and the Appellant, now that the period for which the loan was given had expired, was bound to return the money. That the notes, receipts and transfers, incidentally referred to in the declaration and put in evidence, were merely ancilliary to the original agreement, which was one *ex mutuo*, and that nothing but the repayment of the money will discharge the borrower from the obligation he assumes in receiving the money. In support of his position the Respondent's counsel cited: Savary, vol. 1st, p. 42 and 44; Pothier, *Contrat de change*, part 1st. chap. VI; Byles, *on bills*, pp. 138–166; Angell & Ames, pp. 172,-173; Nugier, p. 328; Selwyn's *Nisi prius*, p. 325; Story, *on bills of exchange*, p. 492; Bailey, pp. 108, 389, 414, 415; Jousse, tit. V, p. 43, 55.

On the 10th July, 1845, the court, composed of the Hon. Sir James Stuart, Bart., Mr. Justice Bowen, Mr. Justice Panet, Mr. Justice Bedard, Mr. Justice Gairdner, and Mr. Justice Mondelet, pronounced the following judgment:

Considering that the promissory note declared upon, in the Respondents' declaration in the court below, was, by the

terms thereof, made payable to Charles Lamontagne, esquire, as treasurer of the House of Industry, in the said note mentioned, or to his order, and that the said promissory note, having been by the said payee thereof, as such treasurer, endorsed in blank, was, by the holder of the said note, delivered up to the said Adam Ferrie, as being discharged, in consideration of two other promissory notes for five hundred pounds each, made and delivred by the said Adam Ferrie, in lieu thereof, and that the said Adam Ferrie, in receiving back the said first mentioned promissory note, and, in making and delivering the said two other notes, in lieu thereof, as aforesaid, acted in good faith and without notice, or knowledge of any want of authority from the said wardens of the House of Industry to the said Charles Lamontagne, to make such endorsement of the said promissory note first mentioned, as aforesaid, or any breach of trust or duty, by or in the part of the said Charles Lamontagne, in making such endorsement, and that, by reason of the premises, the said promissory note, before the bringing of this action, in the court below, became due and was satisfied and discharged, and the said Respondents became and were barred from any recourse against the said Adam Ferrie, upon or by reason of the said promissory note, it is by the said court now adjudged, that the said judgment of the court below, made and rendered on the twenty-first day of January, one thousand eight hundred and forty-five, be, and the same is hereby reversed and altogether held for nothing; and the said court now here, proceeding to render such judgment, as by the court below ought to have been rendered; it is, by the said court, now here, further adjudged that the said action of the said wardens of the House of Industry, in the court below, and the same is hereby dismissed. (1 *R. de L.*, p. 27.)

Mr. ROSE, counsel for Appellant; BUCHANAN, Q. C., and Mr. JOHNSON, counsel for Respondents.

ATERMOIEMENT.—OBLIGATION CONDITIONNELLE.

COUR DU BANC DE LA REINE, Montréal, janvier 1845.

J. L. BEAUDRY et autre, *vs.* JEAN BAREILLE.

Jugé: Que le débiteur qui, dans un contrat d'atermoiement et composition, obtient de ses créanciers remise d'une partie de sa dette, et termes de paiement pour le reste, à la condition qu'il paie le montant de la composition, au temps fixé, sera tenu de payer le montant de toutes ses créances, s'il n'a pas fait les paiements de la composition au temps convenu, quoiqu'après l'échéance des termes de paiement de la composition, il ait fait offre de faire ces paiements.

Les Demandeurs font commerce en société, à *Montréal*, dans le Bas-Canada, et le Défendeur fait commerce à *Bytown*, dans le Haut-Canada. En l'année 1842, ce dernier souscrivit cinq billets, à l'ordre des Demandeurs, pour un montant total de £351-0-2, sur lesquels il était dû, le premier décembre 1842, une balance de £321-15-2. Le 12 avril 1843, par acte passé à Montréal, devant Gibb, notaire, intervint un contrat d'atermoiement, entre le Défendeur et ses créanciers, au nombre desquels étaient les Demandeurs pour cette somme de £321-15-2. Cet acte d'atermoiement contient en résumé les dispositions suivantes : "Jean Bareille est incapable de payer entièrement ses créanciers, et il leur a proposé une composition de dix schellings par louis, payables comme suit : deux schellings six deniers par louis, le premier décembre prochain, deux schellings six deniers le premier juin 1844 ; deux schellings six deniers le premier décembre 1844 ; dix deniers par louis le premier juin 1845, et un schelling huit deniers par louis, complétant le montant de la composition, le premier décembre 1845, sans intérêt. Les créanciers du dit Jean Bareille acceptent cette offre, et conviennent de le décharger de ses dettes, dans le cas où la dite composition serait payée à temps, en la manière susdite. Le dit Jean Bareille promet faire les paiements susdits, au temps sus-mentionné, et les dits créanciers promettent d'accepter cette composition payable par instalment, et aux temps et époques susdits, en plein paiement, satisfaction et acquit des créances et sommes de deniers, à eux respectivement dues, et qu'aussitôt que les dits instalments auront été payés, ils délivreront au dit Jean Bareille une quittance générale de toutes les créances qu'ils ont contre lui. Pourvu toujours, cependant, et c'est la condition expresse des présentes, que si le dit Jean Bareille est en retard d'effectuer ponctuellement et fidèlement le paiement des dits instalments, ou aucun d'eux, aux temps et en la manière ci-dessus mentionnés, alors, et, dans l'un ou l'autre de ces cas, les dits créanciers reprendront l'exercice de leurs droits, et auront le plein pouvoir et autorité de faire valoir leurs diverses réclamations respectives pour le montant entier de ces diverses créances, déduction faite du montant de tous instalments qui pourraient avoir été payés avant tel retard, et ces présentes seront et deviendront après tel retard nulles, de même que si elles n'avaient jamais été consenties, nonobstant toutes choses y contenues à ce contraire." Les deux premiers instalments, dont l'un du premier décembre 1843 et l'autre le premier juin 1844, n'ayant pas été payés aux Demandeurs, ceux-ci ont, le 3 juin 1844, fait arrêter Bareille, sur *capias ad respondendum*, dans une action pour le montant entier de leur créance, pour la balance des dits cinq billets. Les Demandeurs alléguaient, dans leur

déclaration, que le Défendeur n'avait pas effectué le paiement des dits instalments, à leur échéance, et que, vu ce défaut, ils étaient en droit de réclamer de lui le montant total de leur créance. Le Défendeur a plaidé qu'il avait chargé un agent de payer aux Demandeurs le premier instalment, dû le premier décembre 1843, en vertu du dit acte du 12 avril 1843, et qui se montait à £40-4-4¾, et que cet agent, ayant omis de faire ce paiement le dit jour, premier décembre 1843, il aurait, peu de jours après, et, notamment, le 8 du dit mois de décembre, offert ce montant aux Demandeurs qui l'ont refusé; que, le premier juin 1844, le Défendeur a offert au Demandeur le montant du deuxième instalment, £40-4-4¾, et a renouvelé ses offres du montant du premier instalment. Le Défendeur allègue qu'il est prêt à exécuter l'acte du 12 avril 1843, et qu'il n'est pas obligé de payer aux Demandeurs plus que le montant de cette composition, et il renouvelle ses offres dans son plaidoyer, et dépose le montant des dits deux instalments ainsi offerts. L'acte d'offres réelles fait par le Défendeur aux Demandeurs, le premier juin 1844, contient la réponse suivante de ces derniers: "Si vous nous offrez £321-15-2, et les intérêts depuis que les sommes sont dues, nous les accepterons; nous refusons les offres faites, aujourd'hui, parce que l'acte du 12 avril 1843, est devenu nul, faute d'exécution des clauses y apposées; en temps opportun, et qu'ainsi nous sommes rentrés dans tous nos droits. Par conséquent, nous exigeons les intérêts des sommes ci-dessus, en même temps que le capital." Le 24 janvier 1845, la cour rendit le jugement suivant:

JUGEMENT.

" La cour, sans égard aux exceptions et défenses plaidées par le Défendeur, que la cour déclare mal fondées, et aussi, sans égard aux offres faites par le Défendeur, dans et par ses dites exceptions et défenses à cette action, condamne le Défendeur à payer aux Demandeurs la somme de £321-15-2, cours actuel, de la province du Canada, la balance de celle de $351-0-2 dit cours, comme suit, savoir: *(suit la mention des cinq billets avec leurs dates et le montant)* avec intérêt sur la dite somme de $321-15-2, à compter du 3 juin 1844, jour de l'assignation en cette cause, jusqu'à l'actuel paiement, et aux dépens. (1 *R. de L.*, 33.)

LAFONTAINE et BERTHELOT, avocats des Demandeurs; CHERRIER et DORION, avocats du Défendeur.

ASSIGNATION.

COUR DU BANC DU ROI, Québec, 20 juin 1843.

MCGIBBON *vs.* ST-LOUIS dit LALAMPE.

Jugé : Que l'assignation ne se peut faire de nuit. (1)

Dans cette cause, l'huissier, porteur du bref d'assignation, s'était rendu, vers les dix heures du soir, chez le Défendeur, et avait demandé à loger chez lui. Bientôt la conversation s'engage entre eux, et l'hussier lui déclare qu'il est chargé de lui signifier une action, ce qu'il ne pourra faire que le lendemain, à cause de l'heure avancée. Le Défendeur, piqué de curiosité, insiste à en avoir la communication de suite, et l'huissier, cédant à ses instances, lui en fait la signification de nuit. L'action rapportée en cour, le Défendeur plaida, par une exception à la forme, que la signification était illégale, parce qu'elle avait été faite de nuit, et, le 20 juin 1843, advint un jugement, à l'unanimité, maintenant l'exception à la forme, et renvoyant l'action, avec dépens. Il fut dit, par le président de la cour, que la demande faite par le Défendeur à l'huissier de lui signifier de suite l'action, ne pouvait être considérée comme un abandon formel de son droit d'exciper. La cour exprima son regret d'être obligée d'en venir à un résultat aussi rigoureux, mais elle devait se guider d'après une règle de droit, faite pour assurer l'inviolabilité du domicile, au milieu du repos de la nuit, si heureusement exprimée par cette maxime de la loi des douze tables : *Sol occasus, suprema tempestas esto* (2).

La Cour du Banc de la Reine, pour le district de Montréal, a décidé la même chose, dans une cause de Marie Reine Foucher, contre Joseph Duquet, sous le n° 516. L'action était en séparation de corps et de biens, et l'exploit avait été signifié au Défendeur, à six heures du soir, le 18 janvier 1845. La cour a considéré que, la signification ayant été faite après soleil couché, la signification était nulle.—Jugement du 21 juillet 1845. (1 *R. de Lég.*, p. 44.)

(1) Par l'article 55 C. P. C., l'assignation ne peut être donnée avant sept heures du matin, ni après sept heures de l'après-midi, mais cette disposition ne s'applique pas au cas de *capias ad respondendum.*

(2) *Vide* 1 Bornier, art. 1 du titre II, Conférence des ordonnances.

NOTAIRES.—DESIGNATION.

COUR DU BANC DE LA REINE, Montréal, juillet 1845.

BEAUDRY *vs.* SMART et al.

Jugé: Que les actes passés par les notaires du Bas-Canada, s'intitulant notaires du Canada, sont frappés de nullité. (1)

L'union des deux provinces ayant été consommée, nombre de notaires crurent, par cette raison, que la province du Bas-Canada n'existait plus, et en conséquence, crurent devoir, dans leurs actes, s'intituler notaires du Canada. La Cour du Banc de la Reine, de Montréal, a en diverses occasions, renvoyé des actions fondées sur des actes de ce genre. Les actes passés devant les notaires du Canada n'étaient point authentiques, et ne pouvaient faire foi en justice, étant reçus par des officiers qui ne sont pas reconnus et n'ont jamais existé. Il y a des notaires pour le Haut-Canada, il y en a pour le Bas-Canada, mais il n'y en a pas encore eu pour le Canada.

Le premier jugement dans l'espèce fut rendu dans une cause n° 531, *Morin* vs. *Perrin*, en 1844; en juillet 1845, deux autres causes par défaut ne purent être jugées, à raison de cette nullité: n° 1621, *Franchère* vs. *Séguin*, et n° 1590, *Gervais* vs. *Lambert*. Dans le même terme, une cause de *F. X. Beaudry* vs. *Smart et al.*, et où les Défendeurs avaient même plaidé que l'obligation qui faisait le sujet de l'action était entaché d'usure, l'action fut déboutée comme étant basée sur une obligation reçue par-devant les notaires de la province du Canada. Nous donnons ici ce dernier jugement:

" La cour, après avoir entendu les parties, par leurs avocats, examiné la procédure et preuve, et, sur le tout, délibéré, considérant que l'obligation mentionnée en la déclaration du Demandeur fait voir qu'elle a été passée devant les notaires de la province du Canada, tandis qu'il n'existe pas de tels notaires, et, considérant que la dite obligation, conséquemment, n'est pas authentique, et qu'elle n'est ni prouvée ni admise par les Défendeurs, autrement que comme usuraire et nulle, déboute la dite action du Demandeur, avec dépens." (1 *R. de L.*, p. 45.)

(1) Aujourd'hui, les notaires s'intitulent *notaires publics pour la province de Québec*. V. le *Code du Notariat*, art. 3604 à 3957 des Statuts refondus de Québec, et la cédule n° 8.

PREUVE.

COUR DU BANC DE LA REINE, Québec, 20 février 1844.

ASSELIN *vs.* BELLEAU.

Jugé : Qu'une action pour inexécution de promesse de mariage exige un commencement de preuve par écrit.

Cette action était une action en dommages, pour inexécution de promesse de mariage ; la Demanderesse alléguait avoir cédé au Défendeur, sur la foi d'une promesse de mariage ; elle alléguait la naissance d'un enfant mort depuis, et concluait à ce que le Défendeur fût condamné à lui payer une somme de deniers, par forme de dommages et intérêts, à moins qu'il ne voulût exécuter sa promesse.

PER CURIAM : " Cette action est renvoyée, la promesse de mariage exigeant un commencement de preuve par écrit, de même que toute autre convention au-dessus de cent francs ; et les faits de familiarité entre les parties ne suffisant pas pour faire présumer la promesse, et tenir lieu de commencement de preuve."

Il résulte de cette décision et d'autres semblables, fondées, sans doute, sur les principes généraux, et sur des arrêts et citations qui n'ont pas été compulsés, qu'on ne doit pas faire grand cas, et revenir de la doctrine enseignée par Fournel, *Traité de la séduction*, page 8, résumée en ces termes :

" C'est sous cette condition (la promesse de mariage) qu'une fille est toujours présumée avoir succombé ; la stipulation est si naturelle, si vraisemblable, que, de tout temps, elle a été supposée de droit, sans que la fille eût besoin d'en représenter de titre par écrit."

Cette doctrine de Fournel est fondée sur des principes du droit romain, qui, dans le sens de notre jurisprudence, restent sans application, modifiés qu'ils sont par cette règle de notre droit qui exige un commencement de preuve par écrit dans toutes les conventions d'une certaine valeur. Il est inutile de dire que ces décisions n'ont pas lieu dans l'action en déclaration de paternité, régie par des principes bien différents. (1 *R. de L.*, p. 46.)

INSURANCE AGAINST FIRE.—COMMERCIAL MATTER.

COURT OF QUEEN'S BENCH, Montreal, July, 1845.

SMITH *vs.* IRVINE.

Held : That insurance against fire, by an insurance company, is a commercial transaction. (1)

(1) V. art. 348 C. P. C.

Altho' the judgment in this cause was upon a motion, it contains a decision on a question which may occur frequently, and, therefore, is worth noticing.

The action is brought by the Plaintiff, a trader, against the Defendant, president of an insurance company, for the recovery of the insurance of a certain quantity of flour destroyed by fire at Kingston. The Plaintiff moved for a jury, and the motion was opposed by the Defendant, on the principle that the insuring against fire by an insurance company was not a commercial transaction.

The court adopting the views of the Plaintiff, and declaring that this was a transaction of a commercial nature, granted the motion for jury.

The honorable judge Rolland, however, was not prepared to apply this principle to mutual fire assurance companies. (1 *R. de L.*, p. 47.)

RETROACTIVITE DES LOIS.—ENREGISTREMENT.

COUR DU BANC DE LA REINE, Québec.

TREMBLAY *vs.* BOUCHARD et SIMON, Opposant.

Bureaux d'enregistrement. Rétroactivité de l'ordonnance, 4 Victoria, ch. xxx, reconnue.

Dans cette cause, le Demandeur et l'Opposant demandaient tous deux d'être mis en ordre de distribution, sur le produit des immeubles du Défendeur : l'Opposant, en vertu d'un jugement du 11 avril 1834, enregistré avant le premier novembre 1844 ; le Demandeur, en vertu d'un jugement du 11 octobre 1833, non enregistré. Par le projet de distribution, l'Opposant, créancier d'une date postérieure, était colloqué en préférence au Demandeur ; de là, contestation, de la part de ce dernier, fondée sur l'antériorité de sa créance. L'Opposant maintenait le projet, sur ce que l'enregistrement de sa créance lui avait acquis un droit de préférence, contre tout autre créancier, même antérieur, qui n'aurait pas enregistré, aux termes de l'ordonnance des bureaux d'enregistrement d'hypothèques, 4 Victoria, ch. xxx, section 4. Le 31 mars 1845, la cour, à l'unanimité, a maintenu l'Opposant dans ses prétentions, et renvoyé le Demandeur de sa contestetion, accordant à la créance postérieure enregistrée le pas sur la créance antérieure non enregistrée, et résolvant ainsi dans l'affirmative la question de la rétroactivité de l'ordonnance des bureaux d'enregistrement. Aussi, depuis, tous les ordres ou projets de distribution ont-ils été faits dans ce sens, et homologués par la cour. (1 *R. de L.*, p. 47.)

MARIAGE.—OBLIGATION DES EPOUX.—SUBSTITUTION.

COUR D'APPEL, Québec, 10 mars 1845.

DAME M. L. E. F, dite M.....(Demanderesse en cour inférieure), Appelante, et L. E. C., dit C. (Défendeur en cour inférieure), Intimé.

Un mari est condamné "à fournir à sa femme séparée de corps et " d'habitation, une rente et pension annuelle et viagère de £50 ; ce mari " ne possède que certains biens *à charge de substitution*, en vertu du " testament de son père, qui a dit : "Je défends expressément que ces " biens soient en aucune manière engagés, aliénés, hypothéqués, non " plus que la *jouissance, intérêt ou usufruit d'iceux*, qu'ils (les grevés) reti- " reront pour leur pension et subsistance, et pour la subsistance et " l'éducation de leur famille, sous peine de nullité de tous actes qu'ils " feront contraires à mon intention, pour que ces biens retournent à leurs " enfants, etc., etc."

L'usufruit de ces biens est-il affecté au service de la rente et pension de la femme? Cette question avait été jugée par la Cour du Banc du Roi à Montréal, en faveur du mari, la cour ayant considéré que c'était le cas d'une substitution fidéicommissaire établie par le testament ; que ce que dit BOURJON, *loco citato* (dans le *factum* de l'Appelante), n'était nullement applicable au cas actuel ; que le testateur avait double motif dans sa prohibition d'aliéner : de conserver les biens dans sa famille, et d'assurer des aliments à son fils. Sur l'appel, ce jugement a été infirmé.

Nous tirons des *factums* imprimés des parties, l'exposé des faits de la cause et des moyens que chacune d'elles fit valoir.

De la part de l'Appelante : Elle épouse l'Intimé, en novembre 1834.

Aux termes de leur contrat de mariage, ils furent soumis au régime de la communauté de biens. En outre, l'Appelante est " douée d'une somme de £80, de rente annuelle et viagère, de " douaire préfix," préciput de £100, en faveur du survivant.

Le 12 avril 1842, l'Appelante obtient dans la Cour du Banc du Roi à Montréal, un jugement de séparation de corps et de biens, sur preuves de sévices.

Le 6 mai 1842, elle renonce à la communauté. Par le rapport du praticien, homologué le 21 juin 1842, il est constaté que l'Appelante n'avait point de reprises matrimoniales à exercer, et que les seuls biens immeubles que l'Intimé possédait alors, consistent dans trois emplacements situés dans les faubourgs de Montréal, et à lui échus par le partage des biens de la succession de feu J... C... dit C..., son père, le dit partage en date du 27 mars 1835 (Papineau, notaire) ; lesquels trois immeubles, formant le troisième lot au dit partage, appartiennent à l'Intimé, à charge de substitution en faveur de ses enfants, ou, à leur défaut, en faveur des autres héritiers et légataires du dit feu J... C... dit C..., père, aux termes du testament solennel de ce dernier, en date du 22 mars 1831 (Doucet, notaire). Le 13 octobre 1842, sur conclusions de

l'Appelante, et sur confession de l'Intimé, la cour le condamne à payer à sa femme " la somme de £50 du cours actuel, de " rente et pension annuelle et viagère, à compter du 1er novem- " bre alors prochain (1842), par quartier, et d'avance, de £12 " 10s. chacun."

Les rapports du shérif, sur des exécutions *de bonis*, constatent que l'Intimé n'avait pas de biens meubles.

Le 4 mars 1843, il émane un mandat d'exécution *de terris*, en vertu du jugement qui accorde la pension alimentaire, enjoignant au shérif de prélever : 1° la somme de £12 10s. due à l'Appelante (formant le premier quartier de sa rente et pension viagère) ; et 2° £6 16s. 4d. dus aux procureurs de l'Appelante, par distraction de dépens sur ce dernier jugement.

Le 8 mars 1843, il émane un autre mandat d'exécution *de terris*, en vertu du jugement de séparation, enjoignant au shérif de prélever la somme de £18 9s. 5d. étant les dépens dus sur ce jugement, par distraction, aux procureurs de l'Appelante.

En vertu de ces deux mandats d'exécution *de terris*, le shérif de Montréal procéda à la saisie de "la jouissance et usufruit, " la vie durant du dit Défendeur," des trois immeubles ci-dessus mentionnés. La vente n'eut pas lieu, en conséquence d'une opposition afin d'annuler que l'Intimé logea entre les mains du shérif, et sur laquelle l'Appelante lia contestation avec l'Intimé. C'est du mérite de cette opposition qu'il s'agit, le jugement de la cour inférieure ayant, au mérite, " main- " tenu la dite opposition, avec dépens contre la Demanderesse, " et, en conséquence, adjugé et déclaré nulles et de nul effet " les saisies et exécutions émanées en cette cause, à la pour- " suite de la Demanderesse contre les immeubles du dit Oppo- " sant."

Par son opposition, l'Intimé prétendait que la jouissance et l'usufruit des immeubles saisis ne peuvent être " vendus, " aliénés, engagés ou hypothéqués, durant sa vie en aucune " manière quelconque." Il se fonde sur les disposition suivantes du testament de son père, décédé le 14 juillet 1832 :

" Quant à mes biens meubles et immeubles, argent monnoyé, " dettes actives, actions, et généralement tout ce qui m'appar- " tiendra au jour de mon décès, je les donne et lègue à tous " mes enfants, à diviser également entre eux. (les enfants nés " ou à naître en légitime mariage de J... C... C..., mon fils aîné " né de mon mariage avec feue Josephte R..., représentant " leur père pour une part, excluant le dit J... C... C..., de ma " succession). Et, à l'effet de faire la division de mes biens, " d'une manière juste et équitable, je nomme mes amis, les " sieurs... ou deux d'entre eux, et, les lots faits, ils seront tirés " au sort, pour déterminer le lot de chacun de mes dits enfants,

" et des enfants du dit J... C..., mon fils aîné, auxquels chacun " des lots ainsi assignés fera leur part dans ma succession. La " maison, terrain, et dépendances actuellement en la possession de M... A... fera part de son lot, à l'évaluation qui en " sera faite par les susnommés."

"Et pour assurer à mes dits enfants une subsistance alimentaire et d'entretien, pendant leur vie, et procurer à leurs familles " une éducation honnête, je défends expressément que ces " biens soient, en aucune manière, engagés, aliénés, hypothéqués, non plus que la jouissance, intérêts ou insufruit d'iceux " qu'ils retireront pour leur pension et subsistance, *et pour la " subsistance et l'éducation de leur famille* sous peine de nullité de tous actes qu'ils feront contraires à mon intention, " pour que ces biens retournent à leurs enfants nés en légitime " mariage, à diviser entre eux, ou en cas qu'ils décèdent, ou aucun d'eux, sans enfant, leur part sera répartie entre mes " autres héritiers ou légataires, excepté la part de M... A..., " ma fille, qu'elle aura en propriété du jour de mon décès, " à perpétuité."

A cette opposition, l'Appelante fit une réponse spéciale sous la forme d'exception péremptoire.

Dans l'exception, après avoir relaté une partie du testament, l'Appelante disait, en substance, que " les jugements et créances, en satisfaction desquels avait été faite la saisie de la jouissance et usufruit des dits immenbles, étaient fondés sur des obligations imposées à l'Intimé, tant par la loi du pays que, particulièrement, par son contrat de mariage, obligations auxquels l'Intimé est tenu, aussi bien que les immeubles saisis, conformément à la loi du pays, et d'après le sens et les termes mêmes du testament de son père, lequel testament n'a pu, d'ailleurs, nullement avoir l'effet de faire déroger à ces obligations, et qu'en outre les biens ainsi saisis sont les seuls que l'Intimé possède, et qu'il n'est propriétaire d'aucun autre."

La majorité des trois juges qui composaient alors le tribunal inférieur, donna gain de cause à l'Intimé, en s'appuyant sur la défense " d'engager, aliéner, et hypothéquer," telle qu'énoncée au testament,

L'un des principes les mieux établis de notre jurisprudence est que, lorsqu'une personne a grevé quelqu'un de ses enfants de substitution, le douaire de la femme du grevé peut, à défaut de biens libres, se prendre sur les biens substitués. (*Vide* POTHIER, *Du douaire*, n° 61.) " Cette jurisprudence, dit-il, est " fondée sur ce que le désir naturel qu'ont les hommes de se " reproduire, et de se perpétuer dans leur postérité, doit faire " présumer que, lorsqu'une personne grève de substitution " quelqu'un de ses enfants, sa volonté n'est pas de le priver " des moyens qui sont ordinairement nécessaires pour trouver

" à faire un mariage convenable : étant ordinairement nécessaire, pour parvenir à cette fin, d'avoir de quoi assigner à une " femme un douaire convenable, on doit présumer que l'auteur " de la substitution a eu la volonté d'excepter de la substitution dont il a grevé son enfant, autant qu'il serait de besoin, " pour assigner un douaire convenable à la femme qu'il épousera."

Voir aussi BOURJON, tome II, *Des substitutions*, page 189, chap. VIII, section 1, art. 1, 2, 3.

Cette doctrine est inconstestable; elle a été admise par tous les juges de la cour inférieure, qui ont reconnu qu'après la mort de son mari, l'Appelante pourra prendre le douaire stipulé dans son contrat de mariage, sur les immeubles en question, à défaut de biens libres suffisants pour le remplir ; mais la majorité de la cour n'a pas voulu lui reconnaître, pour le paiement de la pension alimentaire à elle accordée par jugement, l'exercice du même privilège du vivant de son mari. Il y a néanmoins, ce semble, la même raison de décider, dans un cas comme dans l'autre. On pourrait même dire qu'il y a dans l'espèce présente, de plus fortes raisons de faire l'application du principe à la pension alimentaire accordée par le jugement qu'à la pension alimentaire résultant de la constitution du douaire. Nous désignons sous le nom de pension alimentaire le douaire stipulé au profit de l'Appelante ; en effet, c'est expressément comme "rente annuelle et viagère" que ce douaire a été constitué. En outre, cela tient même à la nature du douaire de la femme. " Ce douaire," dit Pothier, aux n°s 1 et 5 de son traité, est " ce que la loi accorde à la femme dans les biens de son mari, *pour sa subsistance*, en cas qu'elle lui survive."

Mais, indépendamment de cette pension alimentaire, qui, sous le nom de douaire est assurée à la femme, sur les biens de son mari après sa mort, le mari n'a-t-il pas, par le mariage même, contracté l'obligation de lui fournir la même pension de son vivant, et tant que le mariage subsiste ? Ne doit-il pas fournir des aliments à sa femme ? S'il était même possible de supposer un cas où ce devoir serait plus sacré que dans un autre, ce serait sans doute le cas où le mari, par sa conduite et ses sévices, aurait mis sa femme dans la dure nécessité de quitter le toit conjugal, et de chercher une protection dans une séparation de corps et d'habitation. Or, cette subsistance que le mari, de son vivant, est obligé de fournir à sa femme, consiste dans les choses nécessaires à sa nourriture et à son entretien. C'est une pension, c'est une rente annuelle et viagère, due pendant le mariage, et dont celle qui résulte du douaire, et qui, pour la femme, devient exigible, sous ce nom, après la mort du mari, n'est pour ainsi dire que la continuation. Toutes deux, quant à la femme, existent au même titre, et déri-

vent de la même cause, l'obligation du mari de pourvoir à la subsistance de sa femme, aussi bien durant le mariage qu'après sa dissolution. Dans l'un, comme dans l'autre cas, la femme doit avoir le même droit et le même privilège à exercer, pour forcer son mari à lui fournir cette subsistance. Autrement, il faudrait reconnaître que la loi a permis à l'Intimé de se soustraire, pendant le mariage, à l'accomplissement de cette obligation.

Il a été démontré que la femme a le droit, dans certains cas, de prendre son douaire sur les biens que son mari tient à charge de substitution. Il faut ajouter que cela a lieu lorsque l'auteur de la substitution est un des ascendants du mari, ce qui est le cas dans l'espèce actuelle. Ce douaire affecte tellement les biens substitués que, quand il y a lieu de l'exercer sur ces biens, non seulement l'usufruit s'en trouve engagé, mais même la propriété peut s'en trouver par suite aliénée, au préjudice de la substitution, qui, dans un tel cas, ne produit aucun effet, quant à cette partie des biens substitués que le douaire absorbe.

Mais le testateur, en créant une substitution, a voulu que ses biens fussent recueillis par les substitués. L'exercice du douaire, ayant l'effet de soustraire une partie de ces biens à l'opération de la substitution, ne pourrait-on pas prétendre que cette soustraction est contraire à la volonté du testateur ? Non, tout au contraire ; la loi, en assujétissant au douaire les biens substitués, se fonde sur la volonté présumée du testateur. En grevant son fils de substitution, au profit des enfants de ce dernier, le père est nécessairement censé avoir voulu que son fils pût s'établir avantageusement, par un mariage convenable, et avoir, par là même, tacitement excepté des effets de la substitution, telle partie de ses biens dont l'emploi peut être jugé nécessaire à former cet établissement. La subsistance de la femme est la première obligation du mari, résultant de son mariage. Si le mari n'a pas d'autres biens que des biens substitués, une partie en doit donc être employée à fournir la subsistance de la femme. Le père, auteur de la substitution, est censé l'avoir voulu ainsi. C'est ainsi qu'une jurisprudence constante en soumettant les biens substitués au douaire, est venue en aide au silence du testateur pour expliquer sa volonté. Si donc c'est par suite de la volonté supposée du testateur que ses biens, quoique grevés de substitution en faveur des enfants de son fils, doivent être employés, après la mort de celui-ci, à subvenir aux aliments de sa veuve, à plus forte raison, doit-on dire qu'il a voulu de même qu'ils fussent employés au même objet, pendant le mariage, puisque ce mariage a été, avant tout, dans les intentions et les volontés du testateur, et que, sans ce mariage, il

ne pouvait avoir aucune espérance que le but qu'il avait, en substituant ses biens au profit des enfants de son fils non encore marié, pût jamais s'accomplir. S'il n'a pas imposé à son fils, en termes exprès, l'obligation d'employer, avant tout, à la subsistance de sa femme durant le mariage, la jouissance et l'usufruit des biens qu'il lui léguait, à charge de substitution, ce n'est pas parce qu'un tel emploi eût été contraire à sa volonté, mais bien, sans doute, parce qu'il ne voulait lui faire l'injure de penser qu'il pouvait ne pas les faire servir à cette destination. Cette destination étant donc conforme à la volonté du testateur, le mari ne saurait, par son propre fait, en forçant sa femme de se séparer de lui, rendre cette destination sans effet, et éluder ainsi la volonté de son père, ce qui aurait nécessairement lieu, si le jugement de la cour inférieure dût être confirmé.

L'Appelante doit faire remarquer que les saisies qu'elle a fait pratiquer, ne touchent qu'aux revenus des immeubles, ce qui n'affecte en rien la substitution, tandis que, quand il y aura lieu d'exercer son douaire, la propriété d'une partie au moins de ces immeubles pourrait, par suite, être détachée de la substitution. Ainsi, de ces deux droits, l'exercice de l'un n'est pas contraire à la substitution, tandis que l'exercice de l'autre pourra y porter préjudice ; ce qui tend à rendre plus favorable, s'il est possible, la position prise par l'Appelante.

Quels moyens a-t-on de repousser les prétentions de l'Appelante ? Il semble qu'il n'en peut exister aucun, à moins de soutenir, par hypothèse, une proposition qui serait étrange, celle qu'il a été dans l'intention et la volonté du testateur que les revenus des biens par lui légués à son fils, ne seraient pas employés à la subsistance de la femme de celui-ci. Si l'on prétendait que telle a été la volonté du testateur, il faudrait au moins trouver cette volonté clairement exprimée. Or, que l'on examine attentivement son testament, et l'on verra que, loin de présenter l'expression d'une pareille volonté, il offre celle d'une volonté tout à fait contraire. Il fait défense, il est vrai, " d'engager, aliéner, hypothéquer, la jouissance, intérêt ou usufruit " des biens légués ; mais dans quel but, et comment s'exprime-t-il ? Il veut que ses enfants grevés de substitution retirent cette " jouissance, intérêt ou usufruit " ; mais est-ce pour eux seuls, et pour se l'approprier exclusivement ? Non ; c'est pour " leur pension et subsistance, " il est vrai, mais c'est aussi " pour la *subsistance* et l'éducation de leur *famille.* " La *famille* du grevé est mentionnée par le testateur ; il n'a donc pas borné au grevé seul sa disposition quant à l'emploi qui devait être fait de cette " jouissance, intérêt ou usufruit" ; il l'a expressément étendue *à la famille* du grevé ; celui-ci ne doit rien faire qui puisse en priver cette *famille.* Cette dis-

position ayant été ainsi étendue à *la famille* du grevé, elle s'étend donc à la femme de ce dernier ; car qui, plus qu'elle, appartient à cette famille ? La défense "d'engager, aliéner et hypothéquer " ne regarde que l'acte au moyen duquel le mari grevé "engagerait, aliénerait ou hypothéquerait" cette "jouissance, intérêt ou usufruit" au profit d'un tiers, et au préjudice, non seulement de lui-même, mais encore au préjudice de sa *famille*, et, par conséquent, de sa femme.

Le président, en prononçant jugement, parut s'appuyer principalement sur une décision antérieure de la même cour, dans une cause de *Chabot contre Dillon*, donnant à entendre que la même question y avait été jugée dans le même sens, cependant les deux cas sont bien différents. Dillon, père, avait légué la jouissance et l'usufruit de ses biens à ses quatre enfants, avec déclaration expresse que c'était pour leur servir d'aliments, et avec défense, en conséquence, de faire aucun acte qui fût de nature à les priver de ces aliments. L'une de ses filles, non mariée et avancée en âge, cède et transporte à Chabot, personne étrangère à la famille, le quart qu'elle pouvait prétendre dans la succession de son père. C'est cet acte d'aliénation qui fut déclaré nul, comme étant contraire aux volontés du testateur.

De la part de l'Intimé : C'est ici le cas d'une substitution fidéicommissaire, et non d'un simple usufruit. La jouissance de ces biens est aussi donnée par le testateur à ses enfants (les grevés), pour leur subsistance alimentaire, il en a fait un legs d'aliments non aliénable, et, par conséquent, non saisissable, et il en avait le droit. L'effet de la saisie de ces biens devant avoir pour résultat une aliénation, et aussi de priver l'Intimé du revenu d'iceux serait directement contre la volonté du testateur qui a voulu tout le contraire, car ces biens aliénés, il ne reste rien à l'Intimé, pour sa subsistance alimentaire, ce qu'a voulu empêcher le testateur, et il en avait le droit.

L'Appelante, en vertu du jugement en séparation de corps et de biens qu'elle a obtenu contre l'Intimé, et de la condamnation pécuniaire qui s'y trouve en sa faveur, est devenue, purement et simplement, créancière de son époux, et n'a pas plus de droit, pour être payée sur les biens substitués déclarés insaisissables, qu'aucun autre créancier, et ne peut être considérée que sur le même pied.

L'Intimé cite, à l'appui de ses prétentions, les autorités suivantes : Proudhon, vol. I, p. 12, n° 16 ; le même, vol. II, n° 894 ; Répertoire de jurisprudence, *verbo* aliment, p. 324 et 325 ; Pigeau, vol. I, p. 612 et 650 ; Héricourt, *Vente d'immeubles par décret*, p. 44.

Le 10 mars 1845, est intervenu le jugement de la Cour

d'Appel, qui met au néant celui du tribunal de première instance. En voici la substance :

" La Cour d'Appel,.....considérant que l'usufruit viager, " saisi et pris en exécution en cette cause, à la poursuite de " l'Appelante, et mentionné dans l'opposition *afin d'annuler* " de l'Intimé, appartient (is vested) au dit Intimé, en vertu " du testament de feu J.... dit C...., son père, et est pos- " sédé par lui, l'Intimé, en vertu d'un legs contenu au dit " testament, à l'effet que le dit Intimé jouira du dit usufruit, " sa vie durant, pour sa provision alimentaire, et pour la " subsistance et l'éducation de sa famille ; et, considérant, " aussi, qu'à raison du dit legs, ne peut être regardée comme " exempte d'exécution et de vente, que telle partie du dit " usufruit saisi et pris en exécution comme susdit, qui peut " être nécessaire pour assurer et fournir la provision alimen- " taire susdite, et pour la subsistance et l'éducation susdites, " et que la valeur du dit usufruit viager peut excéder ce qui " peut être nécessaire pour ces fins ; et, considérant encore " qu'il n'a pas été constaté, par aucun procédé de la cour " inférieure, et qu'il est tout de même incertain, quelle peut- " être la valeur du dit usufruit viager ; et considérant aussi " qu'il devrait être constaté si la vente du dit usufruit viager " d'une certaine partie ou de certaines parties des biens im- " meubles, qui y sont sujets, ne pourrait pas avoir lieu sans " affecter la provision alimentaire que le susdit legs avait " pour but d'assurer, et qui pourrait être fournie à même " l'usufruit du reste des dits biens immeubles, qui y sont " sujets ; et, considérant, en conséquence, qu'en maintenant la " dite opposition du dit Intimé, et en déclarant la saisie du " dit usufruit nulle et de nul effet, sans enquête préalable des " faits en dernier lieu mentionnés, *il y a erreur dans le dit* " *jugement* de la cour inférieure ; il est décidé, par la présente " cour, que le jugement dont est appel, savoir, le jugement de " la Cour du Banc du Roi du district de Montréal, rendu en " cette cause, le 19 février 1844, soit et il est par les présentes " infirmé et annulé ; "

" Et cette cour, procédant à rendre le jugement que la cour " inférieure aurait dû rendre, adjuge et ordonne, avant décision " finale sur l'opposition susdite du dit Intimé, que par " experts.... les biens immeubles dont l'usufruit a été saisi " et pris en exécution, comme susdit. (Suit la désignation de " ces biens) : seront visités et examinés, et que les dits experts " estimeront, établiront et rapporteront à la dite cour (cour " inférieure), sans délai quels sont ou quels peuvent être les " loyers, revenus et profits, ou la valeur annuelle, ou autre, " de chacun des dits biens.., et ce afin que la dite L.. E.... " F.... puisse, sur et à même le produit de la vente à faire,

" en vertu du bref de *fieri facias* émané en cette cause, de " telles parties des dits biens immeubles, qui seront trouvées " excéder en valeur ce qui peut être nécessaire pour la subsis- " tance et l'éducation de l'Intimé, et des autres membres de sa " famille, être payée du montant de son jugement, en prin- " cipal, intérêt et frais, mentionné dans le dit bref de *fieri* " *facias;* et que, dans le cas où il n'y aurait pas un tel " excédant, ou que l'excédent ne serait pas suffisant pour " acquitter le dit jugement, elle soit maintenue dans ses droits, " concurremment avec le dit Intimé et les autres membres de " sa famille."

Ce jugement a été rendu à l'unanimité. Les juges présents étaient les honorables sir James Stuart, baronnet, juge en chef du Bas-Canada, Bowen, Panet, Bedard et Mondelet. (1 *R. de L.*, p. 81.)

MM. LAFONTAINE et BERTHELOT, avocats de l'Appelante; M. GIARD, avocat de l'Intimé, et M. CARTIER, plaidant en appel.

SALE.—REDHIBITORY ACTION.

COURT OF QUEEN'S BENCH, Montreal, vacancy after July term, 1845.

WILLIAM FOOTNER *vs.* JAMES G. Heath.

Held : That it is not sufficient that a vice exist in the thing sold, it must be of a character to be perceived at once. The vendor is bound to guarantee that the thing sold is fit for the usual general purposes. The general rule is that nothing but prescription can bar an action. It is for the jury to say if the thing sold was examined within a reasonable time, and if the action followed soon enough. (1)

This was an *action rédhibitoire.* Plaintiff declared, that, on 7th November, 1844, he bought from Defendant a cask of olive oil, for £48 9s., which he paid for at the time, Defendant promising that the oil should be good olive oil, fit for burning; that, immediately after the oil was delivered, he examined it, and found it unburnable and useless; that he offered it back to Defendant who refused to receive it; conclusion, that Defendant be ordered to take it back, and to return Plaintiff price paid, with interest and costs.

Defendant pleaded, that, at time of sale, he was a commission merchant, and known as such to Plaintiff; that Defendant had received said oil in consignment from a house in England, and did not know, at time of sale, that it was affected with any vice; that Plaintiff saw a sample of it, at the time of sale; that it was delivered to Plaintiff, on the 7th

(1) V. art. 1530 C. C.

November last; that, after it had been seven days in Plaintiff's possession, he gave Defendant a note for it, which note was afterwards duly paid, thus closing the transaction, in respect of the said oil; that the Defendant, before Plaintiff made any complaint, had remitted to his principal the proceeds of the sale; that Plaintiff made no complaint until six weeks after the sale; that if there was any vice in the oil, at the time of the sale, it was easily ascertainable, and that if any such vice did exist, the Plaintiff, by common care, could have ascertained the same, at the time of the sale; that, if the oil did not burn well, at the time of delivery, it was merely because it had not time to settle, and not because any vice existed in the oil affecting its substance or essential qualities; that, long before the institution of the action, the oil had become fit for use and that it had not taken an unreasonably long time to settle, considering that it was sold in the original cask; that more than six months elapsed between time of sale and the action.

At the trial.—Plaintiff called *Wood*, the Defendant's clerk, who proved that, at the time of sale, he was asked his opinion of the oil, and said it was good, but did not guarantee it: first complaint made by Plaintiff about a month after purchase. Plaintiff offered back the oil, but witness refused it; Plaintiff saw a sample of oil in another cask; cannot say that that sample was burnable; after Plaintiff complained of the oil sold to him, witness tried some of the same lot, and it would not burn, but afterwards it did, and now it does burn. Plaintiff's two clerks proved the oil unburnable, and useless at the time Plaintiff opened it; it was tried fairly, the part tried being thawed perfectly; this was about a fortnight after delivery; Plaintiff offered it back to Jones (also an agent for Defendant), immediately afterwards. Oil such as this is intended for burning. No manufactories here which use or buy such oil. Plaintiff has the oil still in his possession. Plaintiff is now retired from business. Other witnesses proved that such oil, oil in such bulk, was intented for burning, and was generally considered lamp oil; one said that he, sometime after sale to Plaintiff, asked Defendant's clerk if he had olive lamp oil for sale, who replied that he had, but could not sell it, it being bad. Impossible, for merely looking at oil, to say whether it is burnable.

Defendant called several witnesses, among them Wood, the Defendant's clerk, who proved that Defendant was and is a commission merchant only; that the oil sold to Plaintiff had been received on commission; that after sale, and before complaint was made, proceeds had been remitted to principals; that, since the action brought, witness asked Plaintiff to let

him try the oil, but Plaintiff refused. Plaintiff may not have known that Defendant was a commission merchant ; the bill of sale was made in the name of the Defendant simply. Defendant has a sign over his place of business, but the words " commission merchant " are not upon it. The custom of trade is that, by the giving and the taking of a note, the transaction is closed. Other witnesses deposed, that the Board of Trade allowed only two days for examination, after delivery of goods sold ; that oil has a great sediment, and does not settle for a long time ; that the oil sold to Plaintiff might have required till the spring to settle properly ; that, before settling, the oil might be unfit for use, although not bad. Olive oil is used in manufactures, as well as for burning.

MEREDITH, Q. C., & BETHUNE, for Defendant : The Plaintiff did not buy *lamp* oil expressly, account sales state olive oil simply. The oil sold is not proved to have been useless for a variety of purposes, for which it might have been used. Defendant did not warrant the oil sound for burning, no fraud is alleged, and the maxim *caveat emptor* applies. Defendant, buying the oil when he did, late in the fall, and from a quantity just received, must have known that it would have been congealed, and not very clear for sometime afterwards, but require time for settling. Action is brought too late after settlement.

MACKAY, for Plaintiff : From the nature of the contract of sale, vendor is bound to guarantee that the thing sold is fit for the purposes for which it is bought ; he is as much bound to this, although he makes no express guarantee, as if he did make one. (Troplong, *Vente*, 411) : Here, the oil sold was not merely inferior, but unburnable, useless ; it was affected with a vice latent. That it was bought for burning, we must presume ; that is usual purpose to which such oil is applied ; witnesses say that oil in such bulk is for burning. Plaintiff complained soon enough, and there is no rule *fixing* time (within thirty years) within which such actions shall be brought, jury to judge whether or not the action has been brought soon enough. Plaintiff is not proved to have dealt with Defendant, except in his own sole name. What if the oil be good now ? It is proved to have been had when he wanted it. If bad, when Plaintiff wanted to use it, aud when action brought, sufficient. What if Plaintiff paid for the oil ? Actions like the present are never brought but to recover a price *paid*.

DAY, J., charged the jury. It is not sufficient that a vice exist in the thing sold. It must be of a character not to be perceived at once. The vice alleged to have been in the oil sold is of such a character. Defendant was bound to guarantee that the oil sold was fit for the usual general purposes. It is for the jury to say for what purpose Plaintiff probably bought

it, and for what purposes it was probably sold. Established that oil in such packages is generally used for burning. Appears clearly that the oil would not burn when Plaintiff tried it. It is for the Jury to decide, whether the fact that the oil was not combustible at the time, although it may, since, have become combustible, is, or is not sufficient to set aside the sale. Was the Defendant bound to sell oil burnable *at that time?* Would a temporary defect in the oil entitle Plaintiff to set aside the sale, and seek back the price ? It is said that the action is not brought in time; the general rule is, that nothing but prescription can bar an action. In causes like the present, usage will govern probably. If the jurors think that Plaintiff examined the oil within a reasonnable time, and that the action has followed soon enough, Plaintiff is entitled to verdict The payment by Plaintiff neither increases nor diminishes the rights of the parties, nor is the case affected by the Defendant's being a commission merchant : Defendant did not treat with him in that quality, and did not know any other party but Defendant. The jury returned a verdict for Plaintiff, granting his conclusions. (*1 R. de L.*, p. 92.)

LEASE.—SAISIE-GAGERIE.

COURT OF QUEEN'S BENCH, Montreal, July, 1845.

ZEIGLER *vs.* MCMAHON.

Held: That the lessor, to use the right of *Saisie-gagerie par droit de suite*, is bound to declare and prove that the lessee has not left sufficient furniture to secure the rent. (1)

The Plaintiff in this cause, by deed before notaries, leased to the Defendant, a hardware merchant, a certain house and premises in Notre Dame street (Montreal), for the term of five years, from the 1st of May, 1843, for the price of £160, for the first year, and £200, for each subsequent year, payable by quarterly payments. In the month of March, as the Defendant was removing to another place, the Plaintiff issued against him a *saisie-gagerie par droit de suite,* setting forth, in his declaration, that the Defendant was *removing all his household furniture, which furnished the said house, and were affected to the payment of the rent* stipulated in the said lease, praying that the said household furniture, and other goods, should remain *saisis gagés*, for security of the rent to become due, according to the said lease.

(1) V. art. 1623 et 1624 C. C.

To this action the Defendant pleaded a demurrer, and the general issue.

The reasons in support of the demurrer were as follows:—

Firstly. Because, inasmuch as, at the time of the institution of the present action, and of the issuing of the writ of *saisie-gagerie* in the said cause, the Plaintiffs admit, in their declaration, that their was no sum of money whatever due or payable by the Defendant to the Plaintiffs, under the lease mentioned in the Plaintiff's declaration, the Plaintiff could not, by law, sue out a writ of *saisie-gagerie* against him, the Defendant, or bring the present action.

Secondly. That, inasmuch as it is admitted, by the said declaration, that, at the time aforesaid, the Defendant was not indebted to the Plaintiff in any sum of money whatsoever, for rent of the premises in the said declaration described, the Plaintiff could not, by reason of the transfer to other premises of any part, or even of all the household furniture, and other effects contained in the said house, wage any action against the said Defendant, other than an action to rescind the lease mentioned in the said declaration.

Thirdly. That it is not alleged, in the said declaration, that there were not, at the time of the institution of the said action, household furniture and other chattels sufficient in value to answer for the payment of one year's rent of the premises leased by the Plaintiff to the Defendant.

The Defendant admitted that all the goods seized (forming almost a complete stock), had been removed by him from the Plaintiff's premises into the new store, within the eight days preceding the seizure thereof. In the argument, the Defendant rested on the 163rd article of the *Coutume de Paris*, granting the right of *saisir gager*, for arrears of rent only, and that, if there were not in the premises sufficient furniture to secure the rent, the lessor had no other remedy than the action of ejectment, and insisted on the necessity of alleging the insufficiency of the furniture. On the other part, the Plaintiff contended, that it was incumbent on the Defendant, in order to invoke the exception to the general principle, granting the *droit de suite*, to show that the premises were furnished sufficiently, the Plaintiff being legally unable to enter the lessee's house, to ascertain the amount of value of the goods and furniture therein, otherwise, it would be obliging the Plaintiff to prove a denegation, *prouver la négative;* and that the allegation required by the Defendant was contained in the words used in the declaration and above cited. And, as to the right of seizing before the rent is due, it would be depriving the lessor of the recourse intended by the law, which is to be taken in a short delay after the removal of the furni-

ture. On the 28th July, 1845, the court rendered the following judgment:

The court, considering that there is no proof before the court, or of record, that the house and premises mentioned and described in the Plaintiff's declaration were not, at the time of issuing the *saisie-gagerie*, garnished for security of the rent to become due for the said premises, under the lease thereof, from the Plaintiff to the Defendant, passed, &c., doth declare the *saisie-gagerie* made in this cause null and void. (1 *R. de L.*, p. 95.)

DEED OF COMPOSITION.

IN THE PROVINCIAL COURT OF APPEALS, Quebec, 1842.

CUVILLIER et *al.*, Appellants, and BUTEAU, Respondent.

Held: That a deed of composition, between a firm and the creditors of that firm, in which it is stipulated that all the creditors shall sign, is not valid or binding upon any of the creditors, unless they all sign. (1)

This was an action of assumpsit, brought for the recovery of the sum of £900, amount of four several promissory notes mentioned in the declaration of the Plaintiffs, alleged to have been made by the Defendant, and one Martin Malherbes, at the time of the making of which notes, the said Defendant and the said Martin Malherbes were copartners.

To this action, the Defendant pleaded by perpetual exception, *péremptoire en droit*, that, by deed executed at Quebec, before Prevost and another, notaries, the 26th day of October, 1839, the copartnership between the said Defendant and the said Martin Malherbes, was dissolved and discontinued; that the said Defendant, to enable him, the said Malherbes, to settle the affairs of the said copartnership, authorised him to that effect, and, agreed that the said Malherbes should use, and dispose of the stock-in-trade of the said copartnership, upon the condition, that upon such disposal of the said stock-in-trade, Malherbes should obtain for the Defendant, a full and entire discharge from the creditors of the said copartnership.

That, on the 30th October, 1839, by act, before Doucet and another, notaries, between Malherbes of the one part, and the Plaintiffs and divers other creditors of the copartnership, before existing between the said Malherbes, and the said Buteau of the other part, the said Plaintiffs had released and discharged the said Buteau from all claims and demands whatsoever, in relation to the said copartnership.

(1) V. la cause de *Beaudry et al.*, vs. *Bareille*, supra, p. 447.

By special answer to this exception, it was alleged, that, by the deed of the 30th of October, 1839, Malherbes had undertaken to pay the creditors of the said copartnership the amount of their respective claims, that Malherbes had failed in this undertaking: that it was covenanted, by the deed, that all the creditors of the copartnership should sign the same, within one month; that certain of the creditors named in the said deed had refused to sign the same; that the release pleaded was conditional; that the condition not having ben fulfilled, the debt claimed by the Plaintiffs was still due.

The main question raised, was, as to the validity of the deed of the 30th of October, 1839, in binding those creditors of the copartnership who had signed the same; a number of the creditors named therein, and who were to have become parties thereto, having subsequently refused their assent.

It was contended on the part of the Plaintiffs, that, by the deed of October, 1839, the covenants contained in the same, were not binding or any of the subscribing parties thereto, until all the creditors of Buteau and Malherbes had signed it; that several of the creditors having refused to sign, the deed, was null and void as to all; (1) no other agreement could be entered into, because the deed contained an assignment to Malherbes of all the stock-in-trade of the partnership, and how could a few of the creditors assign the stock, without the consent of all the creditors? That the refusal of *one* creditor to sign the deed, put it out of the power of the contracting parties to perform the covenants contained in the same; that the authority given by Buteau to Malherbes to dispose of the stock, was upon condition that Malherbes should obtain a release from all the creditors.

On behalf of the Defendant, it was urged, that the discharge was unconditional, with respect to himself; that the condition could only by applied to Malherbes; that this interpretation of the deed was borne out by the powers which he, the Defendant, has intrusted to Malherbes, by the deed dissolving the copartnership; that the assignment of the copartnership's effects made by the creditors to Malherbes, had had the effect of putting Malherbes in possession of the said effects; that this act of the creditors, who were aware of the powers intrusted to Malherbes by the Defendant, and of the condition which the Defendant had attached to Malherbes making an assignment to the creditors, namely, his obtaining a discharge at their hands, was sufficient to entitle the Defendant to a re-

(1) Pothier, *Obligations*, n° 11; 6 Term Reports, *Cooling* vs. *Noyes*, p. 263; 2 Bell's *Commentaries on the law of Scotland*, p. 472, p. 72, note, and p. 473, note; 6 Toullier, p. 625, n. 586; p. 643, n. 606.

lease ; that the Plaintiff and others, the creditors of the copartnership, having accepted Malherbes alone as their debtor, in the place and stead of the copartners, this was the substitution of one debtor to another, which had the effect of discharging the copartnership debt of Buteau and Malherbes, and consequently of releasing the Defendant.

By the judgment rendered in the Court of King's Bench, the action of the Plaintiffs was dismissed, upon which the Plaintiffs having taken their case before the Court of Appeals, that tribunal reversed the judgment of the Court of King's Bench, and awarded to the Plaintiffs the amount of their demand. (1 *R. de L.*, p. 109)

ATTERMOIEMENT.—RESOLUTION.

COUR du BANC de la REINE, Québec, 31 mars 1845.

ATKINSON *vs.* NESBITT.

Jugé : Que le terme de paiement, fixé par un acte d'atermoiement, est une condition résolutoire, qui annule l'acte de plein droit, sans qu'il soit besoin d'en faire prononcer la résolution en justice, et qui donne au créancier le droit de poursuivre *de plano*, le recouvrement de la créance originaire, si le débiteur laisse expirer le terme. (1)

Les Demandeurs poursuivaient pour le recouvrement de certains billets promissoires consentis par le Défendeur en leur faveur. On leur opposa que, par un acte d'atermoiement, ils avaient, conjointement avec les autres créanciers du Défendeur, consenti à recevoir du Défendeur, en paiement de leur dette, une somme de dix schellings dans le louis, payable à certaines époques fixées par l'art. 8; et le Défendeur, en accomplissement de cet acte, offrait de payer l'instalment échu, et en fit le depôt en cour. Les Demandeurs prétendaient que le Défendeur, ayant fait défaut de payer l'installement au terme fixé, il n'était plus en droit de se prévaloir de cette acte, qui devait être regardé comme non-advenu, et que leur droit d'action pour le recouvrement de leur créance originaire renaissait de plein droit.

La preuve ayant établi ce défaut, nonobstant les offres faites (après le terme expiré), par le Défendeur, et quoique les Demandeurs n'eussent jamais mis le Défendeur en demeure de payer, par le jugement, la cour a débouté le Défendeur de son exception, déclaré ses offres insuffisantes, et a maintenu l'action des Demandeurs sur leur créance originaire.

(1) V. *Beaulry et. al* vs. *Bareille*, supra, p. 447, et *Cuvillier et al*, vs. *Buteau*, supra, p. 467.

The court, considering that the said Anthony Atkinson, William Atkinson, and George William Usborne, the Plaintiffs, have proved and established the several facts alleged in their declaration, and on which their said action is grounded, and, considering, also, that the said release pleaded and set up by the said John James Nisbitt, the Defendant, in bar of the said action of the said Plaintiffs, was conditioned and made to depend on a condition precedent, which was not fulfilled by the said Defendant, and that the temporary and perpetual exceptions in this cause fyled by the said Defendant are without legal foundation; it is adjudged that the said temporary and perpetual exceptions of the said Defendant be, and the same are hereby overruled and dismissed, and it is further adjudged that the said Plaintiffs, for the causes, matters and things set forth in the said declaration, do recover from the said John James Nesbitt, the Defendant, the sum of five hundred and six pounds eleven shillings and two pence, current money of the province of Canada.

J. DUVAL, procureur des Demandeurs.

LELIÈVRE et ANGERS, procureurs du Défendeur.

Cette cause a été portée en appel, par le Défendeur, mais a été réglée par les parties, avant d'avoir été jugée.

Cette décision établit uniformité de jurisprudence, dans le district de Québec et dans le district de Montréal, ainsi que le constate le jugement rendu dans la cause de *Beaudry et al.* vs. *Bareille* rapportée *supra*, p. 447. Dans l'affaire *Beaudry et al.* vs. *Bareille*, on avait allégué l'acte d'atermoiement, et on en avait demandé la nullité, tandis que, dans la présente instance, on avait poursuivi sur la créance originaire, de même que si l'acte d'atermoiement n'eut jamais été consenti, et le Défendeur fit, de ce défaut de demande nullité, un de ses moyens de défense. (1 *R. de L.*, p. 111.)

PRESCRIPTION.—COLLEGE.

COUR DU BANC DE LA REINE, Québec, 29 janvier 1845.

LA CORPORATION DU COLLÈGE DE SAINTE-ANNE, *vs.* A. C. TASCHEREAU.

Jugé: Que l'action des précepteurs des institutions publiques se prescrit par un an. (1)

La Demanderesse réclamait du Défendeur £43, comme balance à eux due par le Défendeur, pour la pension de son fils au collège de Sainte-Anne, pendant les années 1835, 1836.

(1) V. art. 2261 et 2262 C. C.

Le Défendeur prétendait avoir payé d'avance à messire Painchaud, fondateur du collège Sainte-Anne, alors dans de grands embarras pécuniaires causés par les dépenses considérables qu'il avait encourues dans l'érection de son collège, une somme plus que suffisante pour couvrir la réclamation des Demandeurs. A l'époque de l'institution de cette action, messire Painchaud était mort; l'administration du collège avait passé en d'autres mains, les entrées, dans les livres de l'institution, étaient rien moins que suffisantes pour donner des renseignements certains sur les prétendus paiements allégués par le Défendeur. Tous les paiements avaient été faits sans qu'il eût été donné de reçus, plusieurs hors de la présence de témoins, quelques-uns par l'entremise d'agents illettrés, incapables de constater les sommes exactes. Toutefois, le Défendeur oppose à cette action deux exceptions: 1° l'exception de paiement; 2° l'exception de prescription, savoir la prescription annale, offrant de se libérer par serment.

Le jugement de la cour, statuant seulement sur l'exception de prescription, l'a admise, et a débouté la Demanderesse de son action.

Cette prescription n'est pas formellement prononcée par notre Coutume (de Paris); elle est empruntée à l'article 265 de la Coutume d'Orléans, à propos duquel Pothier, en son *Traité des obligations*, n° 709, dit: *Et c'est aussi un droit commun.* Deux autres Coutumes avaient aussi des dispositions expresses sur le sujet: celle de Bourbonais, art. 13, et celle de Bar-de-Duc, art. 114.

Cette prescription, d'ailleurs, n'est qu'une présomption de paiement, et celui qui l'allègue doit toujours offrir de se purger par serment. (1 *R. de L.*, p. 112.)

PROCES PAR JURY.—NOUVEAU PROCES.—ASSURANCE.

COUR DU BANC DE LA REINE, Québec, 30 mai 1844.

WILLIAM DILL, Demandeur, *vs.* LA COMPAGNIE D'ASSURANCE DE QUÉBEC.

Jugé: Qu'une partie, qui succombe, dans un procès civil devant un jury, n'a pas droit de demander un nouveau procès, à moins de faire voir "évidemment" que leur rapport ou verdict est contre la preuve offerte ou en contradiction directe avec cette preuve "*clearly against the evidence.*" (1)

Le délai porté dans les règlements d'une compagnie d'assurance, de notifier et déclarer l'incendie et ses circonstances, à la compagnie, n'est

(1) V. art. 426 § 13 C. P. C.

pas, dans toutes les circonstances, un terme fatal et tellement de rigueur, que, faute de remplir " à la minute " cette condition, l'assuré doive perdre pour toujours tout recours. (1)

Sur motion pour un nouveau procès, faite par l'Assurance de Québec, entendue le 16 d'avril 1844, devant Leurs Honneurs sir James Stuart, juge en chef, et les juges Panet et Bedard.

Le trente mai 1844, la cour a rejeté la motion pour un nouveau procès, le juge en chef différant d'opinion d'avec la majorité de la cour.

Nous devons à l'obligeance de l'un des honorables juges, les notes suivantes à l'appui de la décision de la cour.

L'application faite à cette cour est une demande de la part de l'Assurance, condamnée par le rapport du jury à payer au Demandeur la somme de £387 16s. 1½d., pour un nouveau procès. Cette demande est fondée sur deux motifs principaux.

Comme premier moyen l'Assurance allègue que le Demandeur Dill ne pouvait obtenir contre elle une condamnation, parce qu'à défaut de s'être conformé à la 15e condition de sa police, qui ne lui donnait qu'un délai de 14 jours pour faire sa réclamation en détail, ce qui est admis, il n'a pas prouvé une extension du terme voulu par cette 15e condition, jusqu'au 28 octobre, jour où il a fourni son compte en détail ; extension, ajoute-elle, accordée au Demandeur, par des personnes n'ayant pas le droit de lier la compagnie. Comme second moyen, l'Assurance allègue, de son côté, la preuve de ces chefs d'exception (déjà jugés en loi suffisants pour faire renvoyer l'action du Demandeur), et insiste sur un nouveau procès, sur le principle que le *verdict* du jury est contraire au témoignage rendu, et que ce rapport du jury, est par lui-même, une preuve évidente " *d'une fausse déclaration* " de la part du Demandeur, circonstance qui, par elle-même, était suffisante pour le faire déclarer déchu de tout droit de recouvrer aucune indemnité.

Nous posons en principle que c'est à celui qui excipe, et qui, en excipant, devient Demandeur, à prouver ses allégations. C'était donc à l'Assurance qu'incombait l'obligation de prouver les *faits* nécessaires à sa défense, et par elle avancés comme moyens d'exception, savoir, " *que le feu n'était pas accidentel, que le Demandeur en était la cause, soit par méfait ou négligence grossière, qu'il avait fait une fausse déclaration, en matière essentielle, dans l'intention de tromper l'Assurance.* " Il n'est pas dans la bouche de l'Assurance de dire, que le Demandeur ne prouve pas que le feu est l'effet d'un accident, " et d'en conclure que c'est le Demandeur qui en est la cause, ou que, du moins, on doit le présumer. " L'in-

(1) V. art. 2490 C. C.

verse doctrine est la seule reconnue par la loi. Rien ne se présume de ce qui peut entacher l'honneur d'autrui, ou porter atteinte à ses jours.

Il n'y a point d'exception en faveur des Assurances aux règles générales posées dans le droit romain.

Ei incumbit probatio qui dicit. Actori incumbit onus probandi. In exceptionibus dicendum est *reum* partibus *actoris* fungi oportere: ipsumque exceptionem velut intentionem implere (Pand., lib. XXII, tit. III, *De probationibus.*)

Toullier (8e vol., p. 22, n° 18) ne fait presque que la traduction de ces textes, quand il dit: "Celui qui fonde sa prétention sur une négative, soit en demandant soit en *défendant* " doit être chargé du fardeau de la preuve, sans distinguer si c'est une négative de droit, de fait, ou de qualité. Bannissons donc de l'école, et, pour toujours, la subtile et inutile doctrine des Glossateurs; bannissons du barreau la fausse et triviale maxime qu'on ne prouve pas une négative. Restons invariablement attachés à ce principe fondamental dicté par la saine raison: que c'est à celui qui, soit par action, soit par " *exception,*" fonde sa prétention sur une affirmative ou sur une négative, qu'incombe le fardeau de la preuve, sans exception."

Merlin, *Rept.*, p. 406, *verbo* police et cont. d'assurance: " Quant un négociant a fait assurer ses effets pour une somme qui excède leur valeur, on présume, dans le doute, qu'il l'a fait " *de bonne foi et par ignorance;*" c'est pourquoi, lorsque les assureurs allèguent qu'il y a de la fraude de sa part, et qu'en conséquence ils demandent la nullité de l'assurance, ils sont tenus de prouver cette fraude."

Aussi la compagnie a-t-elle senti la nécessité d'offrir la preuve des méfaits dont elle accuse le Demandeur? Mais à qui appartenait de juger de la suffisance de cette preuve? au jury, comme l'a très bien observé le savant juge en chef en son adresse aux jurés. Toutes les questions de fait étaient de leur ressort, et ils les ont décidées dans un sens contraire aux intérêts pécuniaires de la compagnie. Ils avaient ce droit, et, à moins que l'assurance ne puisse faire voir " évidemment " que leur rapport est *contre* la preuve offerte, ou en contradiction directe avec cette preuve, elle n'a pas droit à un nouveau procès. Il ne suffit pas à l'Assurance de pouvoir dire, qu'il appert, par la preuve de circonstances propres à faire planer des soupçons sur le Demandeur et difficiles à expliquer, qu'une partie du témoignage est détruite par l'autre, qu'il y a contrariété, que la prépondérance de la preuve est en faveur de la compagnie, ou que le jury sans erreur étrange aurait pu rapporter un jugement différent: tout cela ne suffit pas, l'Assurance doit aller un pas plus loin, et montrer évidemment" que

le rapport du jury est "*clearly against the evidence,*" en contradiction avec la preuve offerte.

Dans la cause *Swain* vs. *Hall*, 3d. Wils., p. 45. "A new trial was refused, though the chief justice reported that the strength of evidence was against the verdict."

Dans 1 Will., p. 22, l'on trouve cette décision : "Where there was evidence on both sides, a new trial was refused although the verdict was against the opinion of the judge who tried the cause." Mais la décision anglaise la plus analogue au cas actual se trouve dans la cause de *Deacle* vs. *Hancock*, 13 Price, 226 : "Where, from the testimony before the court upon the report, it *does not clearly appear* that the finding of the jury was against the weight of evidence, or that it is necessary, to the justice of the case, that there should be a new trial, or that the result would, or ought to be different, the court will not disturb a verdict."

Cette doctrine est la même que chez nos voisins. *Douglas* vs. *Jousey*, 2d Wen, 352 : "Where the evidence is contradictory, making it the duty of the jury to decide upon the credibility of the witnesses, the court will not set aside a verdict "as against the weight of evidence," although it seems to preponderate against the finding of the jury."

Et dans *Jackson* vs. *Loomis*, 12 Wen, 27, "a verdict will not be set aside, unless it be "*decidelly*" against the weight of testimony submitted to the jury."

D'après le rapport qui nous est fait (et nous n'avons d'autre moyen de juger de la preuve offerte), nous ne voyons pas que le "verdict" du jury soit clairement contre la preuve. Si nous étions convaincus de cela, tout en nous rappelant que trois sentences antérieures ont déjà acquitté le Demandeur des soupcons qui pouvaient peser sur lui, nous serions, dans une poursuite criminelle, avec la même preuve sous les yeux, obligés de dire aux jurés qu'il y a preuve évidente pour condamner le Demandeur comme incendiaire, meurtrier et parjure, et nous devrions être prêts à le condamner nous-mêmes, si la chose était de notre ressort personnel, malgré l'opinion du jury. Cette conviction est loin de nous. Le jury, juge en matière de fait, ne l'a pas condamné, nous ne pouvons le faire, parce que nous n'avons pas la preuve évidente de l'erreur du jury. Nous ne voyons pas "*that the justice of the case*" exige un nouveau procès. Trois enquêtes ont déjà eu lieu. *Interest reipublicæ ut sit finis litium*, et le résultat d'un nouveau procès pourrait être une condamnation plus forte contre l'Assurance ; et que deviendrait alors, l'imputation de "*false swearing*"? Ces observations s'appliquent à tout le "*verdict*" y compris cette dernière imputation "*de fausse déclaration*" (*false swearing*). Après une exposition claire et lumineuse des faits et du droit

sur ce point, de la part du savant juge en chef qui présidait à ce procès, cette question de "fausse déclaration," comme toutes les autres questions de fait, a été soumise au jugement du jury. Les jurés ont décidé en faveur du Demandeur, nous ne pouvons dire que cette décision soit évidemment contre le témoignage. Le Demandeur constate une perte sur ses meubles, hardes, linges, livres, médecines, instruments de chirurgie, en un mot, sur tous les lots assurés ; il réclame une somme quelconque, le rapport du jury est général, et ne fait pas voir sur quels objets doit être imputée la diminution, ce qui serait nécessaire pour établir l'objet sur lequel l'on pourrait prétendre qu'il y a eu fausse déclaration en matière essentielle, et dans le dessein de frauder l'assurance. En pareil cas, dit Merlin, "l'on suppose l'ignorance et la bonne foi." Telle fut la direction donnée au jury ; et il a décidé qu'il n'y avait pas lieu de faire cette imputation au Demandeur. De ce que le jury a trouvé que le Demandeur n'avait pas prouvé toute sa demande, il n'en faut pas nécessairement conclure qu'il a dit "*faux*," en disant qu'il *possédait* tous les objets dont il réclame la valeur.

La *possession* d'une chose et la preuve de cette possession, sont deux choses bien différentes. Le jury a bien eu raison de n'allouer que le montant prouvé à sa satisfaction ; mais il ne faut pas conclure, de cette circonstance, que le Demandeur ne possédait pas d'autres acticles dont il n'a pu offrir la preuve. Il a, *lui*, subi la peine de son défaut de preuve, par la diminution de sa créance ; l'Assurance ne pouvait, "elle," exiger la peine pour fausse déclaration, qu'en offrant, à la satisfaction du jury, la preuve complète du défaut de possession de ces objets. La fausse déclaration ne se présume pas plus que le meurtre.

La décision, dans la cause *Levi & Baillie*, semble, comme le dit Ellis, indiquer que *la seule réduction de moitié* d'une réclamation faite sous serment par un assuré, est *prima facie* preuve *d'une fausse déclaration*, puisque la cour dans cette cause a accordé un nouveau procès. Il faut avouer que, si la raison donnée par les conseils de la corporation, dans cette cause, savoir, que le fait isolé de ne *prouver* qu'une partie de sa demande fait preuve d'une fausse déclaration, quant à la *possession* d'autres articles, eût été adoptée par la cour, quelque mauvaise que soit cette raison, elle militerait en faveur de l'Assurance de Québec. Mais cette raison n'a pas été donnée par la cour qui a accordé le nouveau procès. Aucun des rapporteurs ne donne le motif de la cour. Observons que, dans cette cause l'Assurance avait *fait preuve* de l'impossibilité de la perte alléguée par l'assuré, et que quelque autre motif, meilleur que celui tiré de la différence "entre le montant demandé et celui accordé," a dû exister. C'est ce que l'on peut

inférer d'Ellis, quand il ajoute: "A remark may be made, upon another singular feature in this case, that the claim in general was made, not in respect of goods "loss or damaged by fire," but in respect of goods *abstracted*, in consequence of the opportunity which the fire afforded. It does not appear whether the learned judge directed the jury upon the point, though it might be supposed that a jury would not have found damages, to such an extent, without a direction to that effect." D'où l'on peut présumer que, la police ne s'appliquant pas (comme en France, elle ne s'applique pas au cas de vol ou de soustraction), le juge n'aurait pas dû conseiller un verdict en faveur du Demandeur, dans une circonstance non prévue par la police. Delà, sans doute, le nouveau procès, et non de la mauvaise raison donnée par les conseils de l'assurance.

L'assurance, dans la présente cause, ne peut donc pas obtenir ce qu'elle demande, sur le principe que ce verdict est contre le témoignage, quoique la preuve lui paraisse vacillante. En donnant une attention sérieuse à la preuve qui nous a été rapportée, il n'est presque aucune circonstance de ce malheureux incendie qui ne soit succeptible d'une explication, et nous devons ajouter que, quand même il serait difficile ou impossible de répondre à tous les faits, une culpabilité certaine ne devrait pas pour cela peser sur le Demandeur.

Passons au 2ᵉ moyen de la compagnie d'assurance.

L'Assurance, comme deuxième moyen, allègue, que le Demandeur ne justifie pas de son droit de recouvrer aucune indemnité.

Pour réussir, le Demandeur, il est vrai, devait prouver son contrat, la perte de ses effets à un montant quelconque, causée par un incendie, et l'accomplissement des obligations contenues en sa police d'assurance. La difficulté, entre les parties en cette cause, n'est relative qu'à l'extension du délai de 14 jours porté dans la 15ᵉ condition de la police. Il est admis, de part et d'autre, que le Demandeur (quoiqu'il ait donné l'avis du feu immédiatement), n'a pas fourni le compte détaillé de ses pertes dans les quatorze jours. Le Demandeur invoque une extension de ce délai à celui donné par le président et le secrétaire de la compagnie, et qui lui permettait d'attendre jusqu'au 28 octobre, pour fournir son compte détaillé.

L'Assurance, au contraire, regardant comme un terme fatal et de rigueur, le délai de 14 jours prescrit dans la 15ᵉ condition, répudie l'acte du président et du secrétaire, comme ne pouvant, en loi, lier la compagnie, en donnant un délai ultérieur, et admettant par hypothèse ce droit dans le président et le secrétaire, elle insiste sur ce que le Demandeur n'a pas fourni son compte détaillé dans le temps ultérieurement accordé, savoir, immédiatement après la fin d'une enquête alors

commencée, savoir le 18 octobre, qu'elle considère comme terme fatal.

Les faits constatés à cet égard sont en petit nombre. Le feu eut lieu le 1er octobre. Le 2 octobre, le Demandeur notifie l'Assurance, et le secrétaire se déclare satisfait de cette modification. Le 4 octobre, une enquête relative aux causes de ce feu est commencée devant un magistrat. Le résultat de cette enquête pouvait affecter la liberté et la vie même du Demandeur, si ce résultat lui était défavorable. Avant l'expiration des 14 jours, le Demandeur, fait application au bureau de la compagnie pour un délai, pour fournir son compte en détail, jusqu'à ce que l'enquête commencée soit terminée. Le président de la compagnie et le secrétaire acquiescent à cette demande. L'enquête se termina le 18. Le 28 octobre, c'est-à-dire, dans moins de 14 jours après la fin de l'enquête, le Demandeur remet au bureau de la compagnie, au secrétaire, son compte en détail. Aucune objection n'est alors faite quant au retard. Le lendemain, le Demandeur retourne, au lieu d'objecter au retard, l'on demande de plus amples informations, et d'autres pièces justificatives. Elles sont fournies. Il retourne au bureau, et le secrétaire redige lui-même une déclaration des faits, qui doit recevoir la sanction du serment du Demandeur ; cette déclara- redigée par le secrétaire, est affirmée sous serment, et celui qui fait prêter ce serment est le président de la compagnie. Ce n'est qu'en décembre suivant que les directeurs informent le Demandenr qu'ils le regardent comme déchu de son droit, et ils le réfèrent à la 15e condition de sa police,

Quant à la question de droit, nous ne pouvons regarder comme invariablement vraie la doctrine, que le délai de 14 jours, porté dans la 15e condition de fournir un compte en détail, est un terme fatal et tellement de rigueur que, faute de remplir à la minute cette condition, l'assuré doive perdre pour toujours tout recours, et ce dans toutes les circonstances.

Observons qu'il n'en est pas du laps de temps comme de l'accomplissement *d'un fait antérieur* exigé par la compagnie, tel que la production d'un certificat d'un magistrat. L'accomplissement d'un fait est une condition précédente, et absolue comme le prouvent les autorités citées ; il faut que le fait s'accomplisse. Il n'en est pas de même du simple laps de temps, il est comminatoire, suivant les circonstances. Écoutons les auteurs.

L'Ord. de marine, 1681, prescrit, par son 24e article, à l'assuré de signifier *incontinent* la perte survenue. Notons que cette disposition de la loi est très salutaire, et qu'elle devrait être de *rigueur*, parce que l'Assurance a le plus grand intérêt à être immédiatement avertie de l'accident, parce qu'alors il lui est plus facile de découvrir les causes de la perte, les frau-

des, etc., etc. Les lieux parlent pour eux-mêmes, etc., etc. "Néanmoins, dit Pothier (*Des assurances*, n° 124), l'assuré n'est sujet à aucune peine, faute d'avoir fait cette signification *incontinent*, si les assureurs n'ont rien souffert ; et, il lui suffit de la faire par son exploit de demande."

Dans notre droit, ces restrictions à un temps donné sont regardées comme comminatoires. Ainsi, une faculté de rachat, à une époque fixe, dure trente ans après le temps fixé, s'il n'y a pas eu demande en déchéance de ce droit, et condamnation.

Les efforts faits, en France, par les rédacteurs du code, pour laisser aux tribunaux le moins de discrétion possible, et les obliger à suivre la lettre de la loi, plutôt que de s'en rapporter à leur propre conscience, ont rendu plusieurs jurisconsultes plus sévères, et il s'en trouve qui ne veulent presque plus reconnaître, comme comminatoire, aucune clause d'un contrat. Ils invoquent le "summum jus," mais, comme bien souvent le " summum jus" est " summa injurias," ils sont forcés de dire, avec le célèbre président Favre, cité par Troplong, en parlant du devoir des magistrats : " Il n'en est pas un qui ne compose, " et qui ne doive même composer avec les faits, et tempérer le " droit par les circonstances de la cause."

Voyons les auteurs modernes qui traitent des contrats d'assurance, et des conditions à remplir par l'assuré. Les premiers à citer, Grün et Joliat, *Traité des assurances terrestres*, page 280, n° 237, chap. IV, sect. 3, s'expriment ainsi : " Dans quel " délai doivent être faites ces dénonciations et déclarations de " l'assuré ? Le code de commerce (loi positive) porte, art. 374, " que, dans le cas de tous accidens aux risques des assureurs, " l'assuré est tenu de signifier dans les trois jours à l'assureur " les avis qu'il a reçus.

" Plusieurs des compagnies d'assurances terrestres ont fixé " des délais, y attachant la *peine de la déchéance*. Ainsi, la " compagnie d'assurance mutuelle, ainsi l'article 13, de la " police de la compagnie d'assurances générales, porte que, si " dans les 30 jours, à compter de l'incendie, l'assuré n'a pas " rempli les formalités de la déclaration et de la transmission " à la compagnie, ou à son agent (en France on admet que " l'agent lie le principal, le mandataire le mandant), il est " déchu de ses droits, à moins d'impossibilité constatée.

" La police de la compagnie du Phénix veut que l'assuré " dénonce l'incendie *immediatement*, et fasse sa déclaration " au juge de paix *sans délai*, afin qu'elle ne prononce aucune " forclusion. Ainsi, un simple retard, dans l'accomplissement " de déclarer et de notifier à l'assureur l'incendie et ses circons- " tances, ne soumettrait l'assuré à aucune peine. C'est ce que " décidaient Valin et Pothier, sous l'empire de l'ordonnance " de 1681, qui ordonnait à l'assuré de signifier *incontinent*.

" Cependant on méconnaîtrait et les termes et l'esprit des " polices, on favoriserait la négligence, et peut-être la fraude, " si l'on ne donnait pas quelqu'effet à la clause de *dénoncer* " *immédiatement*. Le mot *immédiatement* indique qu'il est " indispensable que la déclaration soit remise aussitôt que le " désordre innévitable de l'incendie permet à un propriétaire " de satisfaire à cette obligation, dans un temps le plus rap- " proché de l'événement, et qui puisse laisser aux experts des " traces propres à faire connaître la véritable situation des " choses, d'apprécier, en conséquence, le dégât, et d'en estimer " la valeur, à cet égard, c'est aux juges, et aux arbritres, à " prononcer *sur la cause du retard*, l'on sent que les circon- " stances pourront seules décider leur jugement, et leur faire " rejeter, ou admettre, la demande d'indemnité, selon que " l'assuré *aura été négligent, ou qu'il aura été dans l'impos-* " *sibilité d'agir*. Une absence forcée peut être, suivant les " circonstances, considérée comme une cause d'empêchement, " à moins qu'une stipulation exprese n'ordonne à l'assuré de " se faire remplacer, pour la déclaration du sinistre, par une " tierce personne."

Boudisquié, au n° 240, p. 285, est plus rigoureux ; il pose en principe que la peine de déchéance est la loi des parties, et qu'elle doit être exécutée. C'est le " summum jus" qu'il adopte en ce passage ; cependant cette opinion est modifiée dans une autre partie de son ouvrage, n° 189, p. 229 : voici ce qu'il dit en parlant de la stipulation d'un délai emportant déchéance.

" L'assureur, qui impose à l'assuré l'obligation de dénoncer " l'incendie dans un délai fatal, est forcé de lui accorder un " délai assez long, sans quoi, cette disposition trop sévère " serait considérée comme *purement comminatoire*, et les " juges chercheraient à l'éluder. Il ne serait pas juste, en effet, " que l'assuré de bonne foi, qui se trouve momentanément " absent, au moment de l'incendie, pût être victime d'un retard " qui ne suppose ni *fraude* ni *négligence* de sa part : il faut " lui donner le temps nécessaire pour être averti, pour se trans- " porter sur les lieux, et remplir ses obligations, ou envoyer " des ordres à cet effet, s'il est retenu ailleurs."

(Persil, *Des assurances*, p. 212, 213) : "La police de la compa- " gnie du Phénix impose à l'assuré une déclaration immédiate. " L'article 13 est ainsi conçu : " L'incendie doit être annoncé " *immédiatement*, et par écrit, au directeur de la compagnie, " si l'événement est arrivé, dans le département de la Seine ; " et à *l'agent* d'arrondissement, s'il a eu lieu dans un autre " département. Nous ne dirons pas avec Pothier et Valin, " commentateurs de l'ordonnance de 1681, que l'absence de " toute forclusion ne soumet l'assuré à aucune peine. Nous " croyons, avec MM. Grün et Joliat, comme nous venons de

" le soutenir pour la compagnie d'assurances mutuelles, " que *la mauvaise foi évidente* de l'assuré doit entraîner " la résolution du contrat, quant à sa personne, c'est-à-dire, la " perte de tout droit à l'indemnité. MM. Grün et Joliat citent " à l'appui de leur opinion, une sentence arbitrale qui pro- " nonce la décharge des assureurs, *pour cause* de retard *dans* " *la notification régulière* du sinistre." "La sentence arbitrale " nous paraît un peu sévère. Priver un propriétaire assuré de " l'indemnité qui doit lui revenir, en cas de sinistre, c'est, " croyons-nous, user d'une rigueur extraordinaire. S'il y avait " eu *intention évidente* de ne pas accomplir les obligations " imposées par les statuts, alors il y aurait, sans aucun doute " lieu à la déchéance du droit d'indemnité. Mais, pour n'avoir " pas fait *les premiers actes tendant à constater la réalité* " *du sinistre,* pour n'avoir pas, en s'absentant *pour une* " *cause quelconque,* nommé des tiers chargés d'accomplir, en " cas de sinistre, ses obligations envers la compagnie, c'est " entendre un peu trop strictement les dispositions de la " police. Car avec ce système, on en viendrait à l'exclusion de " toutes les explications. Le cas fortuit même ne serait plus " une excuse. Car, toujours, on pourrait dire, il fallait faire " avertir la compagnie par des tiers. Pourtant, *fortuitus casus* " *est cui non potest resisti, et cui præcaveri non potest.* Cujas, " sur la rubrique du code, de locato, *est quoque quod fato* " *contingit, et cuivis patrifamilias, quamvis diligentissimo,* " *possit contingere.*"

Boulay-Paty, *Droit commercial,* vol. IV, après avoir dit que le délai de vingt-quatre heures est de rigueur, et que la *fin de non-recevoir* a lieu, ajoute : " Si des propositions d'accommodement avaient eu lieu entre les parties, et qu'en conséquence, on eut différé de faire ses réclamations dans les vingt-quatre heures, la fin de non recevoir ne serait pas acquise."

D'après l'avis de ces jurisconsultes, la peine de déchéance, quoique stipulée, n'est donc pas absolue et de stricte rigueur. S'il en était ainsi, le cas d'absolue nécessité ne formerait pas même exception, ainsi les héritiers d'un homme enseveli dans les ruines de sa propre maison ne pourraient rien recouvrer, parce que ses héritiers, demeurant à Londres, n'auraient pas pu fournir, à Québec, leur compte détaillé dans les 14 jours. Ainsi, si le Demandeur eût été jeté dans une prison, le jour du feu, sur une accusation de meurtre, par l'assurance, et qu'il y eût été détenu 15 jours, faute de pouvoir trouver caution, et que, sorti après ce délai, il eût présenté son compte et ses pièces justificatives, on lui eût dit que le délai était expiré. En pareil cas, comme en cas de mort, l'Assurance pourrait dire : le terme est un terme fatal et de rigueur, et il est expiré. Tel était notre contrat ; vous y avez acquiescé, c'était à vous, à

tout prévoir, et à nommer un exécuteur testamentaire, un agent, en cas de mort, etc., etc. Nous ne pouvons souscrire à une pareille doctrine, et l'opinion des jurisconsultes cités nous paraît seule conforme aux principes de la justice. L'on ne peut imputer au Demandeur aucune négligence, et l'on peut dire qu'il y avait pour lui impossibilité de fournir ce compte plus tôt. Il n'y a pas de négligence, il va demander cette extension avant que le délai soit expiré. Et peut-on exiger que le Demandeur, sur la tête duquel l'on fesait peser des soupçons de meurtre, eut l'esprit assez libre, au milieu d'une enquête dont le résultat pouvait affecter ses jours, pour s'occuper des détails d'un compte ? Il devait être dans *l'impossibilité morale* de préparer cet état en détail : et le président et le secrétaire en accordant au Demandeur, sous ces circonstances, un délai ultérieur, ont agi comme ils devaient le faire. Mais, disent les conseils de la compagnie, ce délai n'a été donné que jusqu'à la fin de l'enquête, et il ne peut être étendu au delà de ce terme, savoir : le 18 d'octobre. Nous pensons que les observations précédentes relatives à un terme fixe et positif, porté nommément dans la 15e condition de la police, sont applicables à l'extension de temps donné par l'assurance durant l'enquête, et que cette nouvelle convention doit recevoir une interprétation raisonnable d'après les circonstances et non une interprétation de rigueur, et en cas de doute cette convention doit s'interpréter contre la compagnie, comme le disent les auteurs, parce qu'elle est la partie contractante. Remarquons que cette convention n'est pas, de la part de l'Assurance, une renonciation à un droit acquis, car à l'époque où le Demandeur a obtenu ce nouveau délai, il n'était pas en retard, il avait encore plusieurs jours devant lui, et la compagnie n'avait acquis aucun droit de déchéance contre lui.

Le président et le secrétaire, en accordant cette extension, ne pouvaient avoir d'autre motif que celui de donner au Demandeur le loisir de veiller librement à cette enquête, qui menaçait ses jours. C'eût été une moquerie de lui dire, qu'il avait jusqu'à la fin de l'enquête pour fournir son état détaillé, mais cependant que, durant et pendant cette enquête, il devait s'occuper de ce soin, faire la recherche des pièces justificatives, pour produire le tout " à la minute," l'enquête finie. Faute de cette explication, ce délai doit être censé avoir été un délai raisonnable " après l'enquête finie." Et qui dira qu'un délai de dix jours, dans ces circonstances, est exorbitant. Ce ne peut être cette cour, parce que la compagnie elle-même ne l'a pas regardé comme tel ; parce que la compagnie a accepté le compte du Demandeur, sans aucune objection à cet égard, parce que la compagnie, loin d'objecter alors, n'a demandé que

de nouvelles pièces justificatives, parce qu'après avoir reçu ces nouvelles pièces justificatives, le secrétaire n'a plus exigé du Demandeur qu'une déclaration par écrit rédigée par le secrétaire lui-même, et affirmée en présence du président de la compagnie, agissant alors en sa double capacité de président et de juge de paix ; parce qu'en donnant eux-mêmes à cette convention la même interprétation que celle donnée par le Demandeur, ils sont censés y avoir acquiescé, et l'avoir sanctionné de nouveau. Reste une autre question de droit soulevée par la compagnie. Le président et le secrétaire n'avaient pas le droit de changer ou altérer les conditions de la police, d'accorder un nouveau délai ; il ne paraît pas qu'ils fussent autorisés à le faire, par conséquent, la compagnie ne peut être liée par une convention faite sans leur participation, disons même, contre les ordres privés donnés aux président et secrétaire.

Cette difficulté est facile à résoudre par l'axiome "*qui facit per alium facit per se.*" Il n'en est pas de la compagnie d'assurance de Quebec, comme de certaines autres assurances dont les *agents sont nommés* par l'acte qui les incorpore. Les seuls agents que peuvent avoir ces compagnies par la loi, sont les directeurs nommés par la loi, eux seuls peuvent lier la compagnie. La loi qui gouverne ces compagnies le veut expressément, et voilà la raison des décisions citées. Il n'en est pas de même de l'Assurance de Québec. Elle n'est, aux yeux du public, qu'une association de commerce dont les membres ne sont pas connus, et qui agit au moyen *d'agents ou mandataires* nommés et reconnus publiquement par la compagnie. Le public ne connaît rien des règles privées de l'association, il ne connaît, et ne peut connaître que les agents. La police d'assurance porte, en termes formels, que le *président et secrétaire sont dûment autorisés à l'exécuter ;* elle porte qu'aucune altération de la police ne peut avoir lieu, excepté *au bureau de la société*, (et c'est le vrai domicile légal de la société), avec l'approbation, non pas des directeurs, mais l'approbation et consentement *du secrétaire ou agent* de la compagnie : elle reconnaît même, à défaut de secrétaire, "un député." L'Assurance ne pourrait pas répudier une police que ses agents, président et secrétaire, auraient accordée, sans insérer la 15e condition, et, à *fortiori*, si les agents de l'Assurance ont le droit de lier l'Assurance, en omettant en entier la 15e condition, ils avaient droit de la modifier, et de donner à leur modification une interprétation raisonnable.

Si le président et secrétaire, ou les agents de la compagnie, vont au delà de leurs instructions, la compagnie a son secours contre eux ; mais le public n'a rien à faire avec les règles secrètes de l'association il n'est pas obligé de les connaître, et, lorsqu'il contracte avec les agents de l'assurance, si les agents en

contractant (notons le mot) *paraissent* se renfermer dans les bornes de leur mandat, les marchands (la compagnie) sont liés.

Quelques citations suffiront pour prouver cette doctrine. *Dalloz*, verbo *mandat*, p. 329, n° 460 : "Pour que le mandataire " oblige le mandant envers celui avec qui il contracte, il suffit " que le contrat qu'il a fait avec lui *paraisse* renfermé dans " la procuration, quoique le mandataire, par des raisons inconnues à ce contractant, aient excédé les bornes du mandat : " ainsi, si mon mandataire, chargé d'emprunter pour moi " £1000, emprunte cette somme d'un premier prêteur, puis " pareille somme d'un second prêteur, il m'oblige envers ce dernier, qui ne savait pas que le second emprunt excédait les " pouvoirs de mon mandataire."

(Arrêt de 1589.) Mornac, in L. fin D. de exercitoriâ act : Poth. n° 89 ; Toullier, tom, VIII, n°s 266, 461. " A plus forte raison, le commettant serait lié par le contrat que son mandataire aurait fait avec un tiers en vertu d'une procuration " qui lui donnait un pouvoir indéfini ; mais que restreignaient " des instructions secrètes dont il n'est pas prouvé que le tiers " ait eu connaissance en contractant." Poth, *Oblig.*, n 79 ; Merlin, 9, *verbo* transcription, 8, 3, n° 462 : Il a même été jugé que les " tiers ne sont pas tenus de s'enquérir des modifications " ou restrictions qui auraient pu être apportées par le mandant à l'exercice des pouvoirs d'un mandataire (les président " et secrétaire de la compagnie) agissant en cette qualité, " d'après *la notoriété publique.*"

De plus, à moins de présumer que le président et le secrétaire, en donnant un délai ultérieur aient agi à l'insu des directeurs et contre leur instruction (la chose paraît impossible d'après les circonstances), il était du devoir de la compagnie de s'opposer à toute modification des conditions et à toute extension de délai, sans attendre au milieu de décembre pour faire une objection tardive. L'autorité de Poth., cité par Dalloz, n 467 s'applique en pareil cas.

" La ratification est tacite, lorsqu'elle résulte de la *conduite* " du mandant. On doit supposer qu'il a voulu ce qu'il n'a pas " empêché."

D'après ces considérations, l'Assurance ne doit pas dans l'opinion de la cour, obtenir le nouveau procès qu'elle demande. (1 *R. de L.*, p. 113.)

TESTAMENT.—LEGS.

COUR DU BANC DE LA REINE, Montréal, 26 septembre 1845.

ALEXIS BENOIT dit MARQUET, et uxor, *vs.* JOSEPH MARCILE.

Une femme, commune en biens, lègue tous ses biens à son mari, "pour cependant n'en pouvoir disposer en pleine propriété qu'en faveur de leurs deux enfants, lui laissant néanmoins le pouvoir de les avantager très inégalement, et de la manière qu'il croira et jugera convenable;" et l'institue son "légataire universel."

Après la mort de sa femme, le mari fait à son fils, le Défendeur, une donation entrevifs de trois immeubles, dont deux avaient été conquêts, et aussi de quelques effets mobiliers; puis, par son testament, il confirme cette donation, et lègue au même tous les autres biens "qui se trouveront lui appartenir et qu'il délaissera au jour de son décès."

Jugé: Que cette donation et ce testament ne sont pas censés comprendre, dans leurs dispositions, les biens de la mère prédécédée. (1)

Le 14 février 1814, mariage de Louis Marcile avec Marie Françoise Lemonde.

Aux termes de leur contrat de mariage, 1° communauté de biens entre eux, avec clause d'ameublissement de deux immeubles appartenant au mari et désignés au contrat, 2° douaire coutumier, ou douaire préfix de mille francs.

Le 28 avril 1836, testament solennel de la dite Marie Françoise Lemonde, avec la clause suivante:

"Je donne et lègue au dit Louis Marcile, mon époux, tous généralement les biens meubles et immeubles, même les sommes de deniers, de quelque nature et qualité qu'ils soient et puissent être, qui se trouveront m'appartenir et que je délaisserai à mon décès, pour cependant n'en pouvoir disposer en pleine propriété qu'en faveur de nos deux enfants, lui laissant néanmoins le pouvoir de les avantager très inégalement, et de la manière qu'il croira et jugera convenable, et le dispensant de faire inventaire des biens de notre communauté; lequel dit Louis Marcile, mon époux, j'institue mon légataire universel. Je nomme mon dit époux exécuteur de mon présent testament, me démettant entre ses mains de tous mes biens, suivant la coutume."

Le 15 mai 1836, décès de la dite Françoise Lemonde, laissant vivants les deux enfants indiqués dans son testament, savoir la Demanderesse et le Défendeur. Après sa mort, et, en vertu de son testament, son mari demeure en possession des biens qui composaient sa succession.

Le 27 juillet 1841, donation entrevifs, faite par le dit Louis Marcile, au Défendeur, son fils, de trois immeubles dont deux

(1) V. la cause de *Viger et ux.*, et *Pothier*, Cour d'Appel, Québec, 30 avril 1830, rapportée supra, p. 319.

étaient les mêmes que ceux qui avaient été ameublis par le contrat de mariage du dit Louis Marcile. Cette donation entrevifs comprenait aussi plusieurs meubles et effets mobiliers énumérés en l'acte.

L'une des charges imposées au Défendeur, par cet acte de donation, était " de payer à Françoise Marcile, sa sœur (la Demanderesse), aussitôt après le décès du dit donateur, la somme de 500 livres, ancien cours, qui lui tiendra lieu du douaire qu'elle pourra prétendre en les biens du dit donateur son père, en renonçant à sa succession. "

Le même jour, 27 juillet 1841, testament solennel du dit Louis Marcile, contenant la disposition suivante :

" J'approuve, confirme et ratifie, par le présent, l'acte de donation entrevifs que j'ai consenti à Joseph Marcile, mon fils mineur, demeurant avec moi, devant maître C. Tétu, notaire soussigné, et son confrère, en date d'aujourd'hui ; et d'abondant, je donne et légue au dit Joseph Marcile, et à ses hoirs et ayants cause, tous les biens, meubles et immeubles que je lui ai déjà donnés par le dit acte de donation susdaté, lequel je le prie de remplir et exécuter dans les termes qu'il est conçu ; et, quant à tous les autres biens, meubles et immeubles, sommes de deniers, et autres, de quelque nature et qualité qu'ils soient et puissent être, qui se trouveront m'appartenir et que je délaisserai au jour de mon décès, je les donne et légue au dit Joseph Marcile, mon fils, que j'institue mon légataire universel. "

Louis Marcile est décédé le 23 avril 1844. Le Défendeur, son fils, a appréhendé sa succession, comme son légataire universel, et en cette qualité il a été, depuis ce temps-là, en possession tant des biens qui composaient la succession de son père que de ceux qui composaient la succession de sa mère, dont son père était lui-même resté en possession.

Le 18 juillet 1844, acte devant notaires, par lequel la Demanderesse, sous l'autorisation de son mari, reconnaît avoir reçu du Défendeur à ce présent, " la somme de 500 livres ancien cours, qu'il était obligé de payer, en sa qualité de légataire universel de feu Louis Marcile, son père, suivant le testament solennel de ce dernier, reçu devant maître C. Tétu, notaire, et témoins, en date du 27 juillet 1841, et la donation aussi de ce dernier au dit Joseph Marcile, de même date, et à laquelle le dit testament réfère, à la dite Françoise Marcile, sa sœur, et qui doit lui tenir lieu du douaire qu'elle pourrait prétendre en les biens du dit feu Louis Marcile son père, à la succession duquel elle renonce, par ces présentes, au moyen de laquelle somme ; sans préjudice à ses droits dans la succession de feue Françoise Lemonde sa mère. "

Cet acte du 18 juillet 1844, portant renonciation, a été duement insinué.

Tous ces faits étaient énoncés dans la déclaration des Demandeurs, dans laquelle ils ajoutaient : Que le dit Louis Marcile était décédé sans avoir, conformément à la faculté qui lui en était donnée par le testament de son épouse, disposé, en aucune manière, en faveur de ses dits deux enfants, de la propriété des biens de sa dite épouse, que, tous les biens qui composaient la succession de la dite Françoise Lemonde, et dont son mari, comme en ayant la jouissance et l'usufruit, était resté en possession jusqu'à sa mort, appartenaient en pleine propriété à la Demanderesse et au Défendeur, chacun pour une moitié.

Enfin la Demanderesse concluait, contre le Défendeur : 1° à une reddition de compte de la succession mobilière de Françoise Lemonde ou au paiement d'une somme de £300 courant, pour en tenir lieu ; 2° à être déclarée propriétaire d'un quart des dits trois immeubles, et à la restitution des fruits et revenus de ce quart, depuis la mort de son père, etc., etc.

Le Défendeur fit à cette action deux exceptions péremptoires.

Dans la première, il invoque le contrat de mariage des Demandeurs, qui est en date du 24 septembre 1837, et auquel est présent le dit Louis Marcile, y stipulant pour sa fille mineure. Dans ce contrat est la classe suivante : " Les biens que la future épouse apporte au présent mariage consistent en les biens meubles et objets mobiliers que son dit père lui donne en pur don et libéralité, sans qu'elle soit tenue de rien rapporter à la succession future de son dit père, advenant le partage définitif d'icelle, savoir *(suit la mention des choses données)*; lesquels meubles, animaux et objets mobiliers ont été estimés entre les parties à une somme de 756 livres cours ancien ; en outre en les hardes et linges de corps de sa défunte mère que son dit père lui donne ; et lesquels biens le père de la dite future épouse a ameublis à l'effet d'entrer en la dite future commnauté."

Le Défendeur allègue que " ces meubles et effets mobiliers faisaient partie de la communauté qui avait existé entre le dit Louis Marcile et la dite Marie Françoise Lemonde à laquelle ils appartenaient pour partie, en outre des linges et hardes de corps qui appartenaient à la dite Françoise Lemonde;" " que d'après les termes du testament de Françoise Lemonde, le dit Louis Marcile, pouvait disposer de la totalité des biens par elle délaissés, en faveur du Défendeur seul, et à l'exclusion de la Demanderesse, qui, en conséquence, n'est aucunement fondée à rien demander ou prétendre en iceux ; " " qu'au surplus, et en supposant que le dit Louis Marcile fût tenu de

disposer en faveur de la Demanderesse d'aucune partie des biens à lui légués par sa dite épouse, il a satisfait à cette obligation, en disposant des meubles et effets mobiliers susmentionnés en faveur de la Demanderesse.

Dans sa seconde exception péremptoire, le Défendeur a dit, que l'un des trois immeubles était un propre en la personne du dit Louis Marcile, lui ayant été donné par sa mère, par acte de donation du 3 juin 1834, et que cet immeuble n'avait point fait partie de sa communauté de biens avec la dite Françoise Lemonde. Aussi la demande a-t-elle été écartée quant à cet immeuble. La dernière partie de cette seconde exception est une réclamation du Défendeur pour remboursement d'impenses et améliorations qu'il prétendait avoir été faites, tant par lui que par son père, sur l'un des immeubles ameublis, et pour des fournitures et avances aussi faites par eux à la Demanderesse.

Le 26 septembre 1845, la cour, à la majorité de deux juges contre un (M. Rolland différant d'opinion), rendit son jugement en faveur des prétentions de la Demanderesse. En voici le considérant:

" La cour, considérant que la Demanderesse et le Défendeur sont seuls légataires universels de feue Françoise Lemonde, leur mère, et que Louis Marcile, leur père, étant décédé avant d'avoir distribué entre eux les dits biens maternels, suivant le testament de la dite Marie Françoise Lemonde, le partage des dits biens doit se faire conformément aux lois et coutumes du Bas-Canada," condamne le Défendeur à rendre compte de la succession de leur mère, et déclare la Demanderesse propriétaire d'un quart de tous les biens meubles et immeubles qui avaient composé la communauté ci-devant existant entre la dite Marie Françoise Lemonde et son mari.

Le président de la cour, M. *Vallières de St-Réal*, en prononçant le jugement, dit en substance:

" Il est vrai que la testatrice, mère des parties, a légué tous ses biens à leur père, comme *légataire universel*. Mais, l'ayant chargé de n'en pouvoir disposer qu'en faveur de leurs deux enfants, elle a réduit ce legs universel à un simple usufruit. La dispense de faire inventaire eût été inutile, si le legs eût été en propriété; car nul n'est tenu faire inventaire de ce qui lui appartient.

" Le legs en propriété est au profit des enfants de la testatrice, avec faculté, à leur défunt père, de partager les biens maternels inégalement entre eux? mais le père des parties n'a pas usé de cette faculté, et les parts ne pouvant plus être faites par le père, la loi a repris son empire, et le partage doit se faire suivant la loi.

" Le père n'a donné à son fils, il ne lui a légué, et n'a pu lui

léguer, ou lui donner, que ce qui appartenait au père et non les biens maternels légués par la mère à ses enfants.

" Le père n'a donné à la Demanderesse aucune portion des biens maternels. Il lui a donné 500 francs, pour lui tenir lieu du douaire qui est une dette de la succession paternelle.

" Les autres menus objets, il les lui a donnés de son chef, et nullement comme sa portion héréditaire maternelle.

" Je pense qu'il faut condamner le Défendeur suivant les conclusions des Demandeurs.

Son Honneur le juge Rolland, en exprimant son dissentiment, l'accompagna de quelques observations. Après avoir exposé les faits sur lesquels roulait la contestation, l'honorable juge cherche quelle est la nature et l'effet du legs contenu au testament de la mère. " Est-ce une substitution fidéicommissaire ? V. Ricard, *verbo* substitution, n° 329, et suivants, p. 322, et suivantes.

" Le mari, légataire universel, a acquis la propriété, car l'héritier grevé de substitution est propriétaire et usufruitier. Les biens ne sont donc plus de la succession de la mère, mais les appelés à la substitution n'ont d'autre titre que la substitution.

" Pour connaître s'il y a substitution fidéicommissaire, il faut saisir l'intention, sans trop s'attacher aux mots. Il me paraît, que l'intention de la mère était de transmettre sa succession à ses enfants. Il y a quelque chose, dans la disposition, qui comporte qu'elle entendait que les enfants tinssent de leur père, (1) et non pas d'elle, lui laissant le pouvoir de les avantager très inégalement. Elle semble charger son légataire (son mari) de donner ou léguer les biens ; mais toujours est-il chargé de les remettre, et c'est ce qui constitue la substitution fidéicommissaire.

" Il y a, dans Thévenot, un chapitre où il est parlé de l'élection laissée au grevé, entre les appelés, c'est le 68e chapitre, p. 334, au § 4, n° 1015, où il dit : " Si le grevé ne choisit personne, ils viennent tous au fidéicommis. L. 24, S. de legat. 2. *Si neminem eligat, etc.*

" Ce n'est pas précisément le cas ici, mais il y a deux appelés, et quoique le grevé n'ait pas formellement le choix, il a le droit d'avantager l'un plus que l'autre, cela ne change pas la nature de la disposition. C'est donc une substitution fidéicommissaire.

" Maintenant vient la question de savoir si le père s'est conformé au testament, et à la volonté de la testatrice telle qu'on doit l'interpréter.

(1) *Vide* Thévenot, *Des substitutions*, p. 7, n° 11, ch. I, et aussi le n° 7 : " Il faut, pour que le fidéicommis ait lieu, que le second donataire reçoive de la main du premier donataire, et non de celle de l'auteur du fidéicommis."

" Il a, dit-on, obligé son fils, le Défendeur, à donner £500 à sa sœur, en faisant au Défendeur donation de tous ses biens, et puis il a ensuite fait un legs universel qui comprend le même avantage à sa fille. Si ces £500 étaient partie des biens de la succession de la mère, il y aurait plausibilité dans la prétention du Défendeur ; mais cette somme est donnée à la fille, pour lui tenir lieu de douaire ; et comme elle ne peut réclamer l'un et l'autre, il s'ensuit que le père ne lui a donné que ce qui lui appartenait, et que le douaire étant pris sur les biens du père, cette donation de £500 n'étant d'aucune partie des biens de la succession de la mère, le père ne faisait qu'acquitter une dette dont ses propres biens étaient chargés.

" La prétention du Défendeur que son père a pu ne rien laisser à sa fille, sans contrevenir au testament de son épouse, offre une difficulté plus grande.

" Ricard, *Substitution*, traité III, ch. XI, part. II, p. 450, n° 63 établit que, dans le cas où un père est chargé de laisser les biens à ses enfants, il peut choisir entre les enfants, et satisfait à la volonté du testateur, et cela dans tous les cas où la disposition est dirigée à la personne du grevé.

" Elle l'est très fortement au cas actuel, puisque la testatrice lui laisse le pouvoir de les avantager inégalement.

" En supposant le cas qu'elle n'eût rien dit de cela, et se fût contenté de dire que son mari ne pourrait disposer de ses biens qu'en faveur de leurs enfants, alors on pourrait prétendre que le mari avait le choix. En disant qu'il pourrait les avantager inégalement, il semble qu'elle ne change pas la disposition de la loi, mais lui donne plus de force, puisqu'elle veut qu'ils ne soient pas appelés pour une part aliquote des biens, mais pour ce qu'il plaira à son mari de donner à chacun ; et, quoiqu'il soit plausible de dire qu'elle semble vouloir que chacun de ses deux enfants participe, pour quelque chose, au legs, comme cette part est des plus minimes, il semblerait plutôt qu'elle a voulu laisser au père ce qu'un père peut faire de sa propre succession, donner à qui bon lui semble de ses enfants.

" Ricard, aux additions sur le même chapitre, p. 460, cite l'opinion de M. D'Olive, liv. V, ch. XIV, qu'un mari institué par sa femme, et chargé de rendre l'hérédité à leurs enfants, peut élire qui bon lui semble, si les substitués sont nommés en général sous le nom d'enfants, mais qu'il n'en serait pas de même, s'ils étaient particulièrement exprimés chacun par leurs noms propres. En effet, ajoute Ricard, il n'y a pas d'inconvénient qu'encore que la liberté de choisir n'ait pas été expressément donnée par le testateur, l'on ne la puisse présumer par les conjectures tirées de la disposition. Plus loin, p. 463, Ricard

établit que l'institution d'heritier tient lieu d'élection, et s'étend aux biens sujets à restitution.

" Pour adopter une décision en faveur du Défendeur, il ne resterait plus qu'un doute, savoir si, ayant parlé de ses *deux enfants*, ce n'est pas la même chose que si elle les eût nommés par leurs noms. Il semble que non ; elle ne fait que mentionner le nombre de ses enfants, et ce nombre aurait pu être de huit, ou dix, comme de deux.

" Si l'on doit présumer, par des conjectures, de l'intention de la testatrice de laisser à son mari le choix entre ses enfants, certainement qu'il y a lieu ici de le faire, bien plus que si elle n'eût rien dit d'un partage inégal entre ses enfants.

La Demanderesse poursuit le Défendeur, en qualité de légataire universel du père commun et produit un testament passé devant un notaire de la province du Canada. Le Défendeur ne nie pas cette qualité et produit le même acte. La cour ne pouvant déclarer nul cet acte dont les parties reconnaissent la validité ; et, même dans cela, elles reconnaissent qu'il y a un legs universel du père au fils, et c'est sur cet aveu qu'on doit adjuger. (1 *R. de L.*, p. 140.)

De la part des Demandeurs, les autorités suivantes ont été citées : Ricard, t. II, *Des Substitutions*, p. 457 et suiv. ; Henrys, t. III, liv. V, ch. III, quest. 16, p. 76 ; Pothier, *Des Substitutions*, éd. in 4°, p. 416.

ENREGISTREMENT.—RETROACTIVITE.

CIRCUIT DE TERREBONNE, 8 septembre 1845.

M. le juge C. MONDELET.

MARIE M. LAUSON et al. *vs.* CATHERINE BELANGER.

Action hypothécaire pour le recouvrement de £12 10s., montant du douaire préfix constitué en faveur de la mère de la Demanderesse.

Jugé : Qu'un tiers, qui a acquis un héritage, avant, et non *subséquemment* au 1er novembre 1844, ne peut opposer à l'action du créancier hypothécaire, une *fin de non-recevoir*, fondée sur ce que le titre n'a pas été inscrit avant le 1er novembre 1844, terme fixé pour l'inscription, par l'ord. 4 Vict., ch. xxx, sec. 4. (1)

La Défenderesse a acquis l'héritage dont il est question, avant le 1er novembre 1844.

La Défenderesse a plaidé que le contrat de mariage par lequel le douaire est constitué, n'a pas été enregistré (inscrit) avant le 1er novembre 1844, et qu'en conséquence, l'héritage

(1) Cette ordonnance n'est plus en force ; nous trouvons aujourd'hui les lois d'enregistrement aux articles 2082 à 2157 C. C.

V. la cause de *Tremblay* vs. *Bouchard et Simon*, opp., rapportée supra, p. 453.

que tenait le mari de la mère de la Demanderesse, lors du mariage, est maintenant libre de l'hypothèque que veulent faire valoir les Demandeurs contre la Défenderesse qui le possède.

Loranger, avocat de la Défenderesse, a prétendu que le mot *subséquent*, que l'on trouve dans la 4e sec. de l'ord, 4 Vict.. ch. XXX, doit s'appliquer à l'acquéreur subséquent au titre.

Turgeon, occupant pour les Demandeurs, a soutenu, au contraire, qu'il n'est question, dans cette clause, que de l'acquéreur subséquent au terme fixé pour l'enregistrement.

" LA COUR. : La loi (4 Vict., ch. XXX, sec. 4), a eu pour but de faire connaître à ceux qui, *par la suite*, achèteraient, les hypothèques dont seraient alors grevés les héritages ; car, quant à ceux qui avaient déjà acquis, ils avaient fait leur condition. Ainsi celle qui, dans l'espèce actuelle, a acquis avant le temps fixé par l'ordonnance pour l'inscription d'actes faits, comme à faire, n'a pas à se plaindre, il ne lui a été porté aucun préjudice.

" Il faut se rappeler, en interprétant cette clause, que la loi que l'on cite est assez en dehors des principes, c'est-à-dire ayant un effet rétroactif dans certains cas, sans qu'il faille l'étendre d'une espèce à une autre ; il faut prendre les termes tels qu'ils sont, et ne les appliquer qu'aux choses dont il y est question.

Grammaticalement, le mot subséquent doit être rapporté aux mots qui, dans la même phrase, expriment une idée qui le précède le plus prochainement. Or, en prescrivant l'inscription, voici ce que renferme cette 4e section :

" And every such notarial obligation, contract, instrument in writing, judgment, recognizance, judicial act or proceeding, privilege or hypothecary right or claim, whereof a memorial shall not be registered within the period last mentioned, shall, from and after the lapse of the said period, be inoperative, void and of no effect whatever, against any subsequent *bonâ fide* purchaser, grantee, mortgagee, hypothecary or privileged creditor or incumbrancer, for or upon valuable considerations."

Or, il est assez apparent que les mots *subsequent bonâ fide purchaser* se rapportent à "from and after the lapse of the said period." Car nous trouvons ce qui touche *l'acquéreur subséquent* immédiatement à la suite de l'expression d'une idée, ou plutôt d'une volonté, celle de la législature, *que, dans un temps dit, il y ait inscription.*

Quant à l'interprétation légale, ou, plutôt, quant à l'application du principe d'interprétation, il faut dire que, puisqu'il s'agit de rétroactivité, les termes doivent être reçus tels qu'ils sont, et interprétés, non pas par extension, par analogie, mais dans leur sens naturel.

Il est d'ailleurs facile de s'apercevoir que le mot *subséquent*

ne doit pas *nécessairement* se rapporter au titre, car supposons l'espèce qui suit : une obligation est consentie il y a six ans ; la loi en exige l'inscription, disons sous trois ans. Avant l'inscription, celui qui a consenti l'obligation vend la terre hypothéquée. Après la vente, et même après le temps prescrit pour l'inscription, le créancier fait inscrire son obligation, il conserve son hypothèque, car le défaut d'inscription ne rend pas l'obligation *absolument* sans effet, *void*, mais seulement *relativement*, c'est-à-dire quant à l'acquéreur subséquent. Donc, pour affranchir l'héritage de l'hypothèque, il ne suffit pas que l'acquisition par le tiers soit subséquente au titre, mais il faut qu'elle le soit au terme fixé pour l'inscription.

La cour est, par conséquent, d'avis que l'exception est mal fondée, et l'action bien intentée.

JUGEMENT.

" La cour, considérant qu'aux termes de l'ordonnance du conseil spécial de la ci-devant province du Bas-Canada, de la 4e année du règne de Sa Majesté, ch. XXX, sec. 4, dont les dispositions, quant au terme prescrit pour l'inscription des titres et autres documents y mentionnés, ont été étendues et continuées jusqu'au 1er novembre 1844, la Défenderesse n'a acquis aucun droit, ni *fin de non-recevoir*, à l'encontre de l'hypothèque des Demandeurs, sur l'héritage que la dite Défenderesse prétend être libre de la dite hypothèque, faute d'inscription avant le 1er novembre 1844, du contrat de mariage mentionné en la déclaration des Demandeurs, lequel est du 21 janvier 1809, attendu que la dite Défenderesse avait acquis le dit héritage avant le dit 1er novembre 1844, et non subséquemment au temps prescrit pour l'inscription susdite, renvoie la dite exception, et ordonne qu'il soit procédé à la preuve."

L'on verra, par ce rapport, que la rétroactivité de l'ordonnance 4 Vict., ch. XXX, sec. 4, n'est aucunement mise en question; mais l'espèce dont il s'agissait était toute particulière, et la difficulté surgissait de l'application du mot *subséquent* qui se rencontre dans la sec. 4. Ce jugement n'est tout au plus qu'une exception à la règle générale de rétroactivité établie par la sec. 4, et que personne ne révoque en doute. (1 *R. de L.*, p. 146.)

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" Une sentence arbitrale, rendue par la majorité de trois arbitres, lorsque le compromis soumettait la décision à la majorité des arbitres, est légale mais, si le compromis soumettait la décision à trois arbitres généralement, ils devraient tous être présents lors de la reddition de la sentence, bien que la majorité puisse la rendre. (Meiklejohn *vs.* Young *et* al., *C. B. R.*, *Québec*, 10 avril 1811).... 129

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ASSIGNATION. Ne peut se faire de nuit. (Par l'art. 55 C. P. C. l'assignation ne peut être donnée avant sept heures du matin, et après sept heures de l'après-midi, mais cette disposition ne s'applique pas au cas de *capias ad respondendum.*) (McGibbon *vs.* St-Louis dit Lalampe, *C. B. R.*, *Québec*, 20 juin 1843)..... 450

ASSURANCE. Les polices d'assurances doivent être interprétées comme les autres contrats, et, lorsqu'il y a une garantie expresse, il n'y a pas lieu à interprétation. (Scott *vs.* The Quebec Fire Insurance Company, *C. B. R.*, *Québec*, 20 octobre 1821)..... 181

ASSURANCE. Une condition, dans une police d'assurance, par laquelle, en cas de difficulté, un arbitrage doit avoir lieu, ne prive pas les tribunaux de leur juridiction sur la question. (Scott *vs.* The Phœnix Assurance Company, *C. B. R., Québec*, 20 janvier 1823) 184

" La condition dans une police d'assurance obligeant l'assuré, avant de recouvrer l'assurance, de fournir un certificat d'un magistrat ou notaire, comportant qu'il connaît le caractère de l'assuré, et qu'il croit que l'incendie a eu lieu sans fraude, fait de la production de ce certificat, une condition préalable au recouvrement du montant de l'assurance. (Scott *vs.* The Phœnix Assurance Company, *Con. privé de Sa Majesté*, 13 mai 1829)..... 188

" Dans une assurance contre l'incendie, l'assureur doit payer toute la perte, si elle n'excède pas le montant de l'assurance, quoique les effets assurés soient d'une plus grande valeur. (Peddie *vs.* The Quebec Fire Insurance Company, *C. B. R., Québec*, 20 juin 1824)..... 198

" Le délai porté dans les règlements d'une Compagnie d'Assurance et ses polices dans lesquels avis et déclaration de l'incendie doivent être donnés, n'est pas, dans tous les cas, un terme fatal et tellement de rigueur, que, faute de remplir à la minute cette condition, l'assuré doive perdre tout recours. (Dill *vs.* La Compagnie d'Assurance de Québec, *C. B. R., Québec*, 30 mai 1844)..... 471

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BANC D'ÉGLISE. L'aîné des fils d'un concessionnaire d'un banc a droit de l'occuper, après le mariage de la veuve de son père, au prix auquel il est adjugé ensuite. (Borne *vs.* Wilson *et* al., *C. B. R., Québec*, 20 février 1819).. 173

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BILLET PROMISSOIRE. Le porteur d'un billet promissoire, qui est endossé pour une somme moindre que le montant du billet, ne peut rien recouvrer contre l'endosseur. (McLeod *vs.* Meek, *C. B. R., Québec*, 20 juin 1831)..... 353

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" " Le paiement fait de bonne foi, et sans avis de fraude, au porteur, par le prometteur d'un billet promissoire payable à l'ordre du trésorier d'une société et endossé et transporté par ce dernier, après échéance, pour une dette de jeu, sans l'autorisation de la société est valable (art. 2287 C. C.). (Ferrie *et* The Wardens of the House of Industry, *Cour d'Appel, Québec*, juillet 1845..... 440

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CERTIORARI. Le certiorari diffère de l'appel. Par l'appel, les procédés du tribunal inférieur sont soumis au tribunal supérieur, avec la preuve sur laquelle le jugement est rendu, et ce dernier tribunal prend en considération les faits de la cause, et décide sur le mérite. Sur le certiorari, au contraire, le tribunal supérieur ne fait qu'examiner les procédés de la cour inférieure, et décide s'ils sont conformes à la loi, mais ne s'enquiert pas des faits. Il peut s'enquérir si la dénonciation contient une cause de plainte, qui, par la loi, est de la juridiction du tribunal inférieur, et si les procédés contre le Défendeur ont été tels que la loi l'exige ; s'il a été duement assigné, et si, ayant comparu, il a eu un jour pour plaider, et permission de produire et de faire entendre ses témoins, et de transquestionner ceux à charge ; mais il ne peut s'enquérir du mérite de la cause, et décider si le tribunal inférieur a tiré une conclusion exacte des faits prouvés. Le tribunal inférieur ne peut, par certiorari, examiner le mérite d'une condamnation pour mépris de cour, chaque tribunal inférieur est le seul juge de ces mépris. Les juges de paix, en session générale ou de quartier, ont le

pouvoir de condamner à l'emprisonnement, pour le temps de leur session, pour mépris de cour commis en présence de la cour. (Vallières de St-Réal, requérant certiorari, *C.B.R., Trois-Rivières*, 18 septembre 1834) 425

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COLLISION. Le vaisseau qui est en faute doit payer les dommages. (Maitland *et* al., *vs.* Molson *et* al., *Cour d'Appel, Québec*, 20 novembre 1830)..... 344

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" :—*Vide* MARI.

COMMUNICATION DE PIÈCES :—*Vide* CONTRAINTE PAR CORPS.

COMPENSATION :—*Vide* DEMANDE INCIDENTE.

COMPLAINTE. N'a pas lieu pour trouble dans la possession d'un banc dans une église, par un paroissien contre un autre. (Auger *vs.* Gingras, *C. B. R., Québec*, 13 avril 1819)..... 174

COMPOSITION :—*Vide* CONCORDAT.

COMPROMIS :—*Vide* ARBITRAGE.

" :—*Vide* ASSURANCE.

CONCORDAT. Un acte de composition fait par un débiteur insolvable et quelques-uns de ses créanciers à la condition que tous les créanciers y consentent, n'oblige pas les créanciers qui ont signé, s'il y en a d'autres qui n'ont pas consenti. (Cuvillier *et* al., *et* Buteau, *Cour d'Appel*, 1842)..... 467

" :—*Vide* ATERMOIEMENT.

CONGRÉGATION PRESBYTÉRIENNE :—*Vide* REGISTRES DE PAROISSE.

CONSEIL LÉGISLATIF. A droit d'emprisonner, pour violation de ses privilèges, dans un cas de libelle. (Tracey, requérant, *Cour d'Appel*, 9 février 1832)..... 365

CONSEIL PRIVÉ :—*Vide* APPEL AU CONSEIL PRIVÉ.

CONSENTEMENT :—*Vide* DÉMENCE.

CONSTITUT. Le débiteur d'un constitut peut être condamné d'en faire le remboursement, s'il ne paye pas les arrérages de la rente. (Hiché *et* Lajoue, *Prévosté de Québec*, 22 avril 1732..)..... 7

CONTRAINTE PAR CORPS. A lieu pour refus de remettre des pièces communiquées par la partie adverse. (Maufait *et* Chapeau, *Prévosté de Québec*)..... 10

" " Il n'y a pas lieu à la contrainte par corps contre les femmes mariées, pour le principal, l'intérêt et les frais. (Scott *et* ux., *et* Prince, *Cour d'Appel, Québec*, 25 juillet 1831).... 358

CONTRACTEUR :—*Vide* MANDAT.
CONTRAT :—*Vide* LEX LOCI.
" :—*Vide* EFFETS DES CONTRATS.
CONVENTION D'UNE NATURE MERCANTILE :—*Vide* MATIÈRE COMMERCIALE.
" " " :—*Vide* PROCÈS PAR JURY.
CORPORATION :—*Vide* SOCIÉTÉ PAR ACTIONS.
COUR DE VICE-AMIRAUTÉ. A, sous le statut 57 George III, ch. x, s. 8, juridiction dans les causes pour pénalité, et confiscation sous cet acte. (Wilson *vs.* Norris, *Cour de Vice-Amirauté, Québec*, 11 août 1823)..... 192
" A juridiction dans un cas de collision arrivée dans le fleuve St-Laurent, près de la cité de Québec. (Howard *vs.* Camillus, *Cour de Vice-Amirauté, Québec*, 26 janvier 1823.)..... 189
" A juridiction dans un cas de collision arrivée sur le fleuve St-Laurent, *infra corpus comitatus*, concurremment avec les tribunaux civils ordinaires, (Ritchie *vs.* Orkney *et* ux., *C. B. R., Québec*, 20 avril 1835)..... 438
" :—*Vide* PROHIBITION.
COURONNE. La couronne peut recouvrer l'intérêt, dans les cas où un particulier le peut. (Rex *et* Black, *Cour d'Appel, Québec*, 30 juillet 1828)..... 282
CURATEUR A SUCCESSION VACANTE. Ne peut payer la réclamation d'un créancier, sans avoir le consentement des autres. (Pacaud *et* Guiguière, *Prévosté de Québec*, 24 septembre 1737)..... 13
CURE. Un curé qui a été canoniquement pourvu à la cure d'une paroisse a le droit d'y être maintenu par le tribunal s'il n'a pas résigné. (Soupiran & Lechasseur, *Con. S., Québec*, 14 novembre 1740)..... 36
CURÉ :—*Vide* CURE.

D

DÉCLARATION :—*Vide* PROCÉDURE.
DEMANDE INCIDENTE. Une demande en dommages pour l'inexécution d'une convention pour le transport de certains effets, ne

peut être plaidée à une action pour fret d'une partie des effets transportés. Le Défendeur doit procéder par la demande incidente. (Guay *vs.* Hunters, *C. B. R., Québec*, 16 février 1810)..... 73

DEMANDE INCIDENTE. Si le Demandeur incident ne fait pas voir, dans sa déclaration, que sa demande incidente est liée à la demande principale, le Défendeur doit s'en prévaloir par exception à la forme, et s'il ne le fait pas, mais conteste au mérite, il renonce, par là, à se prévaloir de cette irrégularité. (Turner *et* al., *vs.* Whitfield, *C. B. R., Québec*, 20 avril 1811)..... 130

DÉMENCE. Une donation sera déclarée nulle, s'il est prouvé que, lorsqu'il a fait cette donation, le donateur était en démence. (L'article 986 C. C. dit que les personnes aliénées ou souffrant d'une aberration temporaire causée par maladie, accident, ivresse ou autre cause, ou qui, à cause de la faiblesse de leur esprit, sont incapables de donner un consentement valable, sont incapables de contracter.) (Hiché, demandeur, *et* Guillot défendeur, *et* Haimard, intervenant; *Prév. de Québec*, 2 mars 1731, et *Con. S.*, 11 décembre 1732. 6

DIVISIBILITÉ :—*Vide* SOLIDARITÉ.

DOMMAGES. Le père peut réclamer des dommages de celui qui, par imprudence, a blessé son enfant. (Courtant *et* Sert, *Prévosté de Québec*, 19 juillet 1740)..... 19

" :—*Vide* COLLISION.
" " DEMANDE INCIDENTE.
" " OBLIGATION PÉNALE.
" " OFFICIER PUBLIC.
" " PREUVE.
" " PROCÉDURE.
" " RESPONSABILITÉ.
" " SAISIE-EXÉCUTION.
" " SHÉRIF.

DONATION. Si le donataire n'accomplit pas les charges de la donation, elle sera révoquée. (Leblond *et* al., *et* Drouin, *Prévosté de Québec*, 24 novembre 1741, *Conseil supérieur*, 16 avril 1742)..... 21

" :—*Vide* DÉMENCE.
" " OBLIGATIONS.

DOUAIRE. La femme survivante n'est pas privilégiée pour son douaire et son préciput. (Lapointe *et* Depleine, *Con. S., Québec*, 4 juillet 1735)..... 30

DOUAIRE. Une sentence ordonnant le paiement et le remploi d'un douaire préfix sera annulée. (Lanoix *et* Hermier *et* al., *Con. S., Québec*, 26 novembre 1753)..... 47

DROIT CANADIEN. Il ne peut être contesté qu'avant la cession du Canada, le droit français était en général la loi du Canada comme une des colonies de la France. Il appert aux édits de *Louis XIV*, publiés en mars et avril 1663, qu'après que la compagnie du Canada eut cédé au roi français les colonies de la Nouvelle-France, *Louis XIV* a nommé un conseil souverain en Canada, lui donnant pouvoir "*pour y juger souverainement et en dernier ressort, selon les lois et ordonnances de notre royaume.*" Le droit français en force en Canada, comprenait le droit d'aubaine, et depuis le statut 14, *George III*, ch. LXXXIII, le droit canadien est l'ancien droit français comprenant le droit d'aubaine. La cession du Canada à l'Angleterre a modifié le droit d'aubaine, seulement quant à ce qui concerne le souverain du pays. Lorsque le Roi d'Angleterre est devenu le roi du Canada, ceux qui étaient nés en Canada sont devenus ses sujets, et les Italiens et les autres, qui étaient nés en dehors de la souveraineté du royaume d'Angleterre, sont devenus des étrangers en Canada; et à partir de la cession, c'est le droit anglais, et non pas le droit français, qui doit décider la question de savoir qui est étranger en Canada. Mais, lorsque la question de savoir qui est étranger a été décidée suivant le droit anglais, les conséquences civiles de cette condition sont déterminées par le droit local du Canada qui est l'ancien droit français. Par le droit d'aubaine, le roi succède à l'étranger qui ne laisse pas d'enfants ou descendants qui soient sujets du Roi. (Par l'art. 25 C. C. l'étranger a maintenant droit d'acquérir et de transmettre, à titre gratuit, ou autrement, ainsi que par succession ou par testament, tous biens meubles et immeubles dans la province de Québec, de la même manière que le peuvent faire les sujets britanniques nés ou naturalisés.) (Donegani *et* Donegani *et* al., *Conseil privé*, 2 février 1835)..... 433

DROIT D'ACCESSION :—*Vide* PROPRIÉTÉ.
DROIT D'AUBAINE :—*Vide* DROIT CANADIEN.

E

EFFET DES CONTRATS. Une vente que l'une des parties a promis faire ratifier par un tiers, sera déclarée nulle, si elle n'est pas ratifiée. (de Chavigny de la Tesserie *et* Després, *Prévosté de Québec*, 1er octobre 1737)..... 14
EFFET DES OBLIGATIONS. L'obligation n'a d'effet qu'entre les parties contractantes. (Oakley *vs.* Morrogh *et* al., *C. B. R.*, *Québec*, 20 février 1810)..... 100
ÉGLISE PRESBYTÉRIENNE :—*Vide* REGISTRES DE PAROISSE.
ÉGLISES CATHOLIQUES :—*Vide* MARGUILLIERS.
" " " PAIN BÉNIT.
ÉGOUT :—*Vide* EXPERTISE.
ENFANT. Le père peut poursuivre pour le salaire de son fils. (Fortin *et* Amyot de Vincelotte, *Prévosté de Québec*, 31 décembre 1737)..... 16
" :—*Vide* PUISSANCE PATERNELLE.
" " RESPONSABILITÉ.
ENREGISTREMENT. L'ordonnance d'enregistrement 4 Victoria, ch. xxx, s'appliquait aux actes antérieurs à sa passation. (Tremblay *vs.* Bouchard *et* Simon, opposant)..... 453
" Un tiers qui a acquis un héritage avant le 1er novembre 1844, ne peut opposer à l'action du créancier hypothécaire, une *fin de non recevoir*, fondée sur ce que le titre n'a pas été inscrit avant le 1er novembre 1844, terme fixé pour l'inscription, par l'ordonnance, 4 V., ch, xxx, s. 4. (Lauson *et* al.. *vs.* Bélanger, *Terrebonne*, 8 septembre 1845)..... 490
ENVOYÉ EN POSSESSION :—*Vide* ABSENT.
ÉPOUX :—*Vide* MARI.
" " TÉMOIN.
EXCEPTION :—*Vide* PREUVE.
EXCEPTION À LA FORME :—*Vide* CAPIAS AD RESPONDENDUM.
" " " " DEMANDE INCIDENTE.
" " " " NOM.
EXCEPTION DILATOIRE. Lorsqu'une poursuite pour saisie d'effets est pendante devant un tribunal, et qu'une action en dommages, à cause de cette saisie, est intentée devant un autre tribunal,

le Défendeur, dans cettedern ière action, pourra par une exception dilatoire, demander la suspension des procédés jusqu'à la décision de la première cause. (Hartshorn *et* al., *vs.* Scott *et* al., *C. B. R., Québec*, 12 février 1810)..... 55

EXCEPTION DILATOIRE. :—*Vide* PARTIES EN CAUSE.
" " " PROCÉDURE.

EXCEPTION PÉREMPTOIRE EN DROIT :—*Vide* PROCÉDURE.

EXCEPTION PRÉLIMINAIRE :—*Vide* DEMANDE INCIDENTE.

EXÉCUTION CONTRE LES MEUBLES. Sous le règne français, dans la *Prévosté de Québec*, le propriétaire d'effets mobiliers saisis comme appartenant à un tiers, pouvait les revendiquer par action dirigée contre le gardien. (Aujourd'hui, sous l'article 582 C. P.C., on procède par opposition à fin de distraire). (Voyer *et* Pichet, *Prév. de Québec*, 11 mars, 1728)..... 3

EXÉCUTION DES MEUBLES :—*Vide* LOUAGE.

EXPERTISE. Sera ordonnée pour constater comment un égout doit être construit. (Damour *et* al., *et* Jehanne, *Con. S., Québec*, 29 juillet 1748)..... 46

EXTRADITION. Le pouvoir exécutif peut, en l'absence de traité d'extradition, remettre à un état étranger un fugitif, qui est accusé d'avoir commis un crime dans la juridiction de cet état. (Fisher, *C. B. R., Montréal*, 20 juin 1827)..... 238

F

FABRIQUE :—*Vide* MARGUILLIERS.

FAILLITE. Une commission de banqueroute émanée d'Angleterre, a son effet en Canada, comme cession volontaire, de la part du failli, et le syndic peut, en conséquence, recouvrer les créances dues au failli. (Bruce *et* Anderson *et* al., *C. B. R., Québec*, 20 octobre 1818)..... 170

FAUX :—*Vide* PREUVE.

FEMME MARIÉE :—*Vide* CONTRAINTE PAR CORPS.
" " " MARI.
" " " SUBSTITUTION.
" " " TÉMOIN.

FIDÉJUSSEUR :—*Vide* CAUTIONNEMENT.

FIERI FACIAS :—*Vide* SHÉRIF.

FRAIS DE JUSTICE :—*Vide* LOUAGE.

G

GAGE. Le gage peut être vendu, à la poursuite d'un créancier ordinaire du débiteur, sujet au privilège du créancier gagiste. (Prat *et* Petrimoult, *Con. S., Québec*, 12 juin 1743) 41

:—*Vide* PRIVILÈGE.

GARANTIE:—*Vide* VENTE.

GARDIEN D'EFFETS SAISIS. Peut être contraint, par corps, à les représenter, ou à payer les causes de la saisie. (Gourdeaux *et* Desmolier, *Prév. de Québec*, 31 décembre 1743)..... 22

GARDIEN JUDICIAIRE. Le gardien de meubles saisis a droit d'être déchargé de la garde, si le Demandeur ne les fait pas vendre dans les deux mois de la saisie. (Duburon *et* Chaumereau, *Prévosté de Québec*, 6 mai 1732)..... 8

GOUVERNEUR PROVINCIAL. Une action ne peut être maintenue contre lui dans la colonie, pendant qu'il est gouverneur. (Harvey *vs.* Aylmer, *C. B. R., Québec*, 7 janvier 1833) 402

GRÈVE:—*Vide* RIVIÈRE NAVIGABLE.

H

HABEAS CORPUS:—*Vide* ASSEMBLÉE LÉGISLATIVE.

HÉRITIERS:—*Vide* OBLIGATIONS.

HÉRITIER PRÉSOMPTIF:—*Vide* ABSENT.

HÉRITIER SOUS BÉNÉFICE D'INVENTAIRE:—*Vide* BÉNÉFICE D'INVENTAIRE.

HONORAIRES D'OFFICE:—*Vide* OFFICIER PUBLIC.

" " " VICE-AMIRAUTÉ.

HUISSIER. Doit inscrire les réponses des parties sur les originaux et copies de significations. (Lagroix *et* Lanouiller, *Con. S., Québec*, 12 janvier 1756)..... 49

" :—*Vide* OFFRES RÉELLES.

" " RÉBELLION À JUSTICE.

" " SAISIE-EXÉCUTION.

HYPOTHÈQUE. Un acte reçu en brevet, devant notaire, ne crée pas hypothèque. (Bélair *vs.* Gaudreau *et* uxor, *C. B. R., Québec*, 20 février 1810) 88

" :—*Vide* VENTE.

I

INJONCTION :—*Vide* NOTAIRE.
INJURE. La partie qui a injurié quelqu'un peut être condamnée à faire réparation d'honneur. (Simard *et* Cotton, *Cons. S., Québec*, 22 avril 1743; Liard *et* al. *vs.* Legris *et* al., *Prév. de Québec*, 22 avril 1738)..... 17 et 40
INJURE DANS UN PLAIDOYER. Ordre de biffer d'une requête le terme " extorqué " à l'adresse de l'une des parties. (Charest *et* Charly, *Prévosté de Québec*, 15 octobre 1737)..... 15
INSCRIPTION EN FAUX. Le dépôt doit être fait, par la partie inscrivant en faux, avant que sa requête soit reçue. (Voyer *et* Michelon, *Prévosté de Québec*, 25 novembre 1735)..... 9
" " :—*Vide* PREUVE.
INSPECTEUR DES CHEMINS. Une action contre un inspecteur des chemins doit être intentée dans les trois mois de la date où le droit d'action a pris naissance. (Cannon *vs.* Larue *et* al., *C.B.R., Québec*, 20 octobre 1828.) 296
INSTITUTEUR :—*Vide* PRESCRIPTION.
INTERPRÉTATION DES LOIS :—*Vide* STATUTS.
INTERPRÉTATION DES OBLIGATIONS :—*Vidé* ASSURANCE.
INVENTAIRE, est nul, faute d'avoir appelé le tuteur des enfants mineurs d'un premier lit. (Lanoix *et* Girard, *Prévosté de Québec*)..... 11
" :—*Vide* COMMUNAUTÉ DE BIENS.
IVRESSE :—*Vide* DÉMENCE.

J

JONCTION D'ACTIONS :—*Vide* ACTIONS POSSESSOIRES.
JUGE. Les tribunaux n'ont pas juridiction sur un juge que l'on poursuit en dommage pour des actes commis en sa capacité. (Dickerson *vs.* Fletcher, *C.B.R., Trois-Rivières*... 254
" Il n'y a pas d'action contre un juge pour un acte fait par
" lui dans les limites de sa juridiction. (Gugy *vs.* Kerr, *C.*
" *B. R., Québec*, 20 février 1828)..... 264
JURIDICTION :—*Vide* ASSURANCE.
" " COUR DE VICE-AMIRAUTÉ.
" " JUGE.
JURY :—*Vide* MATIÈRE COMMERCIALE.

L

LETTRE DE CHANGE. Le tireur d'une lettre de change est responsable des dommages, conformément à la loi du pays où la lettre est tirée. (Astor *vs.* Benn *et* al., *C. B. R., Québec*, 20 avril 1812)..... 146

" " Le tireur est un commerçant quant à
" " cette lettre de change. (Georgen *vs.* Mc-
" " Carthy, *C.B.R., Québec*, 2 octobre 1811). 135

LEX LOCI. La loi du pays où le contrat est fait en règle les effets, dans les causes commerciales. (Allen *vs.* Scaife *et* al., *C. B. R., Québec*, 19 octobre 1816)..... 163

LITISPENDENCE. Dans un état étranger ne constitue pas une exception à une action instituée dans la province. (Russel *et* al., *et* Field, *Cour d'Appel, Québec*, 29 juillet 1833)..... 412

LOCATAIRE :—*Vide* OPPOSITION À FIN DE CHARGE.

LOIS CRIMINELLES. Le statut impérial 14 Geo. III, ch. LXXXIII, a introduit dans cette province cette partie du droit criminel qui est d'une application générale. (Rousse, requérant, *C. B. R., Québec*, 29 juillet 1828)..... 280

LOUAGE. Le locateur ne peut empêcher la vente sur saisie-exécution, des effets mobiliers affectés à son privilège de bailleur, (art. 582 C.P.C.), mais le produit de la vente, déduction faite des frais de justice et de garde, doit lui être remis en paiement de son loyer pour autant. (L'art. 1994 C. C. met *les frais de justice et toutes les dépenses faites dans l'intérêt commun au* premier rang des *créances privilégiées sur les biens meubles*, et il met *la créance du locateur, suivant les dispositions de l'article* 2005, au huitième rang. L'article 606 C. P. C. indique l'ordre qui est observé quant à la collocation des frais de justice.) (Voyer *et* Pichet, *Prév. de Québec*, 11 mars 1728)..... 3

" Un faiseur de galoches peut être obligé à vider les lieux par lui loués, s'il y a des plaintes du bruit qu'il peut faire. (V. art. 1624 C. C.) (Léger *et* Monfils, *Prév. de Québec*, 13 avril 1728)..... 4

" Les réparations nécessaires à une maison doivent être constatées par des experts. (Simon *et* Larue, *Prévosté de Québec*, 6 août 1737)..... 11

" :—*Vide* SAISIE-GAGERIE PAR DROIT DE SUITE.

LOUAGE DE SERVICE. L'engagé qui ne fait pas son temps devra perdre son salaire. (Clesse *et* Gatel, *Prév. de Québec*, 22 avril 1758).. 28

LOYER :—*Vide* LOUAGE.

" " SAISIE GAGERIE PAR DROIT DE SUITE.

M

MAINMORTE:—*Vide* TESTAMENT.

MAISON D'ÉDUCATION:—*Vide* OBLIGATIONS.

MANDAMUS, ne sera pas accordé contre un shérif, pour l'obliger à publier dans la gazette officielle, les avis de vente du shérif, lorsqu'il n'appert pas qu'il n'y a pas d'autre remède légal. (Neilson, requérant mandamus, *C. B. R., Québec*, 19 juin 1824)..... 195

MANDAT. Un contracteur d'une bâtisse publique peut maintenir une action contre les commissaires qui ont fait construire, si ces derniers ont reçu du gouvernement les deniers qui étaient dus à l'entrepreneur. (Larue *vs.* Crawford, *C. B. R., Québec*, 20 octobre 1819)..... 177

" :—*Vide* OFFICIER PUBLIC.

MARGUILLIERS. Les anciens marguilliers peuvent être condamnés à faire les poursuites de ce qui est dû à la fabrique. (Cette décision ne serait pas suivie aujourd'hui. C'est aux marguilliers en office à faire les poursuites des créances dues à la fabrique, quoiqu'elles soient devenues exigibles avant leur entrée en office.) (Boutin, marguillier en charge de la paroisse de l'Ancienne-Lorette, *et* Bonhomme *et* al., ci-devant marguilliers, *Prév. de Québec*, 6 juillet 1726)..... 5

MARI. Le mari n'est pas obligé de payer un billet consenti par sa femme sans son autorisation ou consentement (art. 1280, § 2, C. C.). (Jérémie *et* Bellorget, *Prév. de Québec*, 11 juillet 1727)..... 2

:—*Vide* SUBSTITUTION.

MARIAGE. Un mineur ne peut contracter mariage s'il n'est assisté de ses père, mère, tuteur ou curateur. (Baudouin *et* André, *Con. S., Québec*, 12 juin 1741). 37

" :—*Vide* PREUVE.

" " SUBSTITUTION.

MATIÈRE COMMERCIALE. Une assurance contre le feu, par une compagnie d'assurance, est une matière commerciale, et un procès par jury peut avoir lieu dans une action fondée sur cette assurance. (Smith *vs.* Irvine, *C. B. R., Montréal*, juillet 1845)..... 452

" " :—*Vide* LEX LOCI.

" " " PREUVE.

MEMBRE DU PARLEMENT. Un membre du parlement n'est pas exempt d'arrestation pour pratiques traîtresses. (Bedard, requérant *C. B. R., Québec*, 17 avril 1810)..... 102

MÉPRIS DE COUR. La partie qui, contre la bonne foi, offre d'affirmer qu'elle ne doit rien, tandis qu'elle doit, peut être condamnée à la pénalité. (Arguin *et* Jean dit Tourangeau, *Prévosté de Québec*, 14 novembre 1741, et *Conseil supérieur*, 18 décembre 1741)..... 20

" Celui qui manque de respect à la justice, en menaçant son adversaire, devant la cour, pourra être condamné à une amende. (Abel *et* Girard dit Breton, *Prévosté de Québec*, 11 août 1750)..... 26

" Les juges de paix, en session, peuvent condamner pour mépris de cour, et la Cour du Banc du Roi n'interviendra pas, vu que tout tribunal est juge de ses mépris. (Vallières de St-Réal, *C. B. R.*, *Trois-Rivières*, 17 septembre 1834)..... 425

" Un affidavit soumis à des juges de paix en session, alléguant que plusieurs des juges de paix sont les ennemis de l'accusé, et demandant que, par *certiorari*, les procédés soient transmis à la Cour du Banc du Roi, ne constitue par un mépris de cour. (Vallières de St-Réal, requérant certiorari, *C. B. R.*, *Trois-Rivières*, 18 septembre 1834, Bowen, J.)..... 432

" :—*Vide* CERTIORARI.

MINEUR :—*Vide* MARIAGE.

" " PUISSANCE PATERNELLE.

MINISTRE DISSIDENT D'UNE CONGRÉGATION PROTESTANTE :—*Vide* REGISTRES DE PAROISSE.

MINUTES DES ACTES DE NOTAIRE :—TÉMOIN.

MISE EN DEMEURE :—*Vide* ATERMOIEMENT.

MUR DE CLOTURE. Le voisin est tenu d'y contribuer pour séparer la cour jusqu'à la hauteur de dix pieds du rez-de-chaussée, compris le chaperon. (Berthelot *et* Sabourin, *Prévosté de Québec*, 6 mai 1755)..... 27

MUR MITOYEN. Une action pour argent payé, peut être maintenue, par le propriétaire du mur mitoyen contre son copropriétaire, pour sa part du montant dépensé pour la réparation du mur, si ce dernier a implicitement consenti à ces réparations. (Latouche *vs.* Rollman, *C. B. R.*, *Québec*, 17 avril 1722)..... 182

" Le voisin est obligé de fournir neuf pouces de terrain pour la construction d'un mur mitoyen et de contribuer à sa construction dans

sa proportion sur une hauteur de dix pieds. (Boisseau *vs.* Hubert *et* al., *Con. S., Québec*, 7 juillet 1738)..... 35

N

NOM. L'erreur de nom ne peut être plaidée par une exception à la forme. (Jones *vs.* McNally, *C. B. R., Québec*, 8 octobre 1811)..... 137

NOTAIRE. Il peut être fait défense à une personne d'instrumenter comme notaire, si elle n'a pas qualité à le faire. (Le Procureur du Roi *et* Bellevue, *Prévosté de Québec*, 2 avril 1748)..... 24

" Les actes passés par les notaires du *Bas-Canada*, s'intitulant *notaires du Canada*, sont nuls. (Aujourd'hui, les notaires s'intitulent *notaires publics pour la province de Québec.*) (Beaudry *vs.* Smart *et* al., *C. B. R., Montréal*, juillet 1845)..... 451

" :—*Vide* PREUVE

" " TÉMOIN.

NOUVEAU PROCÈS:—*Vide* PROCÈS PAR JURY.

O

OBLIGATIONS. Les héritiers d'un donateur qui, dans un acte de fondation, a chargé une maison d'éducation de recevoir à perpétuité deux enfants de sa famille, qui seront présentés à la dite maison par ses héritiers, pour y faire leurs études, et y être enseignés, pourront faire condamner les directeurs de cette maison à recevoir à perpétuité, et préférablement à tous autres, deux des enfants de la famille du donateur qui leur seront présentés par la famille, pour y faire leurs études et y être enseignés, aux clauses et conditions portées au dit acte de donation (art. 1028 et s. C. C.) (Hazeur *et* al., *et* Lion, de St-Feréol, supérieur du séminaire de Québec, *Prévosté de Québec*, 11 mars 1728; et les supérieurs, directeurs et ecclésiastiques du séminaire des Missions étrangères établi à Québec, *et* Soumande, *Con. S.*, 2 avril 1759.)..... 3 et 52

OBLIGATION :—*Vide* ASSURANCE.

" " ATERMOIEMENT.

" " MARI.

" " TERME DE PAIEMENT.

OBLIGATION CONDITIONNELLE. Celui qui promet quelque chose à un tiers, au cas où un événement impré-

vu arriverait, ne s'oblige qu'au cas de l'événement. (Denis *et* Hiché, *Con. S.*, *Québec*, 14 octobre 1737).. 33

OBLIGATION DES ÉPOUX :—*Vide* SUBSTITUTION.

OBLIGATION PÉNALE. La convention de peine n'empêche pas la partie de réclamer des dommages contre celle qui a refusé d'exécuter son obligation. (Mure *et* al., *et* Wileys *et* al., *C. B. R.*, *Québec*, 20 février 1810)..... 91

OBLIGATION SOLIDAIRE :—*Vide* SOLIDARITÉ.

OFFICIER PUBLIC. Qui contracte comme tel n'est pas responsable personnellement. (Scott *vs.* Lindsay, *C. B. R.*, *Québec*, 20 octobre 1811)..... 146

" " Une action en dommage contre un officier public, ne peut être maintenue, parce qu'il aurait exécuté un jugement d'un tribunal inférieur, si ce tribunal avait juridiction sur la matière. (Goudie *vs.* Langlois, *C. B. R.*, *Québec*, 20 octobre 1819)..... 178

" " Ne peut exiger des honoraires, à moins qu'ils n'aient été établis par l'autorité législative, ou par un ancien usage qui fait présumer l'autorisation législative. (Price *vs.* Perceval, *C. B. R.*, *Québec*, 18 avril 1825).. 204

" " :—*Vide* COLLECTEUR DES DOUANES.

OFFRES RÉELLES. On peut faire des offres réelles à l'huissier porteur d'un exploit d'assignation (la jurisprudence établit le contraire aujourd'hui.) (Vincelotte *et* Dupré, *Prévosté de Québec*, 20 janvier 1733)..... 8

OPPOSITION A FIN DE CHARGE. Le locataire d'un immeuble saisi n'en peut arrêter la vente, par une opposition à fin de charge. (Bogle *et* al., *et* Bonenfant *et* al., opposants, *C. B. R.*, *Québec*, 14 février 1810)..... 63

OPPOSITION A FIN DE DISTRAIRE :—*Vide* EXÉCUTION CONTRE LES MEUBLES.

ORDONNANCE DE COMMERCE. Etait suivie par la Prévosté de Québec. (Havy *et* Perrault, *Prévosté de Québec*, 16 octobre 1736)..... 10

P

PAIN BÉNIT. Les habitants catholiques dans une paroisse sont tenus de faire et présenter le pain bénit à leur tour, et de fournir un cierge, et une quêteuse pour quêter ce jour-là dans l'église. (Cette obligation

ne pourrait exister que dans les paroisse où c'est l'usage.) (Boutin, marguillier en charge de l'Ancienne-Lorette, *et* Riopel, *Prévosté de Québec*, 6 juillet 1728)..... 5

PARTIE DANS UNE CAUSE :—*Vide* PROCÉDURE.

PARTIES EN CAUSE. Une poursuite n'est pas irrégulière parce que des parties qui devaient être mises en cause ne l'auraient été qu'au cours de l'instance. (Viger *et* ux., *et* Pothier, *Cour d'Appel, Québec*, 30 avril 1830)..... 319

PEINE :—*Vide* OBLIGATION PÉNALE.

PENSION VIAGÈRE :—*Vide* SUBSTITUTION.

PÈRE :—*Vide* PUISSANCE PATERNELLE.

POSSESSION :—*Vide* PRESCRIPTION.

PRÉCIPUT :—*Vide* DOUAIRE.

PRÉCEPTEURS :—*Vide* PRESCRIPTION.

PRESCRIPTION. On peut plaider la prescription à une réclamation contractée dans un pays étranger sans égard à la loi de ce pays. (Hogan *vs.* Wilson. *C. B. R., Québec*, 9 octobre 1820)..... 179

" Le possesseur de trente ans n'est pas tenu de produire un titre, ni de prouver sa bonne foi. (Séminaire de Québec *vs.* Patterson, *C. B. R., Québec*, 9 octobre 1820)..... 180

" L'action des précepteurs des institutions publiques, pour pension et éducation des enfants est prescrite par un an. (L'article 2261 C. C. dit que l'action des précepteurs et instituteurs, pour enseignement y compris la nourriture et le logement par eux fournis, est prescrite par deux ans.) (La Corporation du Collège de Ste-Anne *vs.* Taschereau, *C. B. R., Québec*, 29 janvier 1845)..... 470

" :—*Vide* RUMB DE VENT.

PREUVE. Dans une action pour recouvrer le montant d'un billet promissoire perdu, le Défendeur peut, d'office, être requis de déclarer sous serment, s'il doit le montant réclamé, et s'il refuse de le faire, il sera condamné. (L'article 1233 C. C. dit que la preuve testimoniale est admise dans les cas où la preuve écrite a été perdue par cas imprévu. L'article 1254 C. C. dit que le tribunal peut, dans sa discrétion, examiner sous serment l'une ou l'autre des parties pour compléter la preuve nécessaire, soit pour la décision de la cause, soit pour déterminer le montant de la condamnation, mais seulement dans les cas où il a été fait quelque preuve de la demande ou de l'exception.) (Trépagny *et* Dauteuil, *Prér. de Québec*, 23 décembre 1727)..... 2

PREUVE. Les livres de compte des marchands peuvent être reçus en preuve contre les acheteurs. (Briard *et* Payès, *Con. S., Québec*, 11 septembre 1752)..... 47

" On ne peut référer le serment à l'encontre d'un acte authentique. (Cuguet *et* Revol, *Con. S., Québec*, 10 avril 1756)..... 50

" Le Statut des fraudes, "statut impérial, 29 C. II, ch. III, s. 17, qui fait partie du droit anglais est en force en Canada, dans les causes commerciales (Art. 1235 C. C.) (Hunt *vs.* Bruce *et* al., *C. B. R., Québec*, 13 février 1810)..... 57

" Les transactions entre commerçants et artisans sont des matières commerciales, et sujettes aux règles du droit anglais sur la preuve. (Pozer *vs.* Meiklejohn, *C. B. R., Québec*, 14 avril 1809)..... 59

" Une écriture sous seing privé peut être vérifiée par des experts nommés par le tribunal, par comparaison d'écritures. (Rouillard *et* al., *et* Levasseur, *Con. S., Québec*, 17 juin 1737)..... 32

" Une indenture d'élection n'est pas un acte authentique, et ne fait pas preuve par elle-même de l'élection. (Bedard, requérant, *C. B. R., Québec*, 17 avril 1810).... 102

" Un notaire ne peut être forcé de témoigner contre son acte, dans une inscription de faux. (Routier *et* Robitaille, *Cour d'Appel, Québec*, 17 novembre 1830). 343

" Dans une action pour inexécution de promesse de mariage, il faut un commencement de preuve par écrit. (Asselin *vs.* Belleau, *C. B. R., Québec*, 20 février 1844). 452

" :—*Vide* TÉMOIN.

PREUVE ÉCRITE PERDUE:—*Vide* PREUVE.

PRIVILÈGE. Celui qui s'oblige à payer une chose en certains effets, constitue par là un privilège sur ces effets, qui autorise le créancier à les faire saisir et vendre par privilège sur iceux. (Par l'article 1970 C. C., le privilège résultant du gage ne subsiste qu'autant que le gage est en la possession du créancier ou d'un tiers convenu entre les parties.) (Daillebout *et* Campeau, *Prévosté de Québec*, 20 octobre 1741).... 20

" Le privilège d'un constructeur de vaisseaux est perdu, si le constructeur le livre au propriétaire, et permet qu'il soit vendu sans opposition. (Baldwin *vs.* Gibbon *et* McCallum, opposant, *C. B. R., Québec*, 19 juin 1813)..... 148

" Un maçon a un privilège sur la bâtisse qu'il a construite, pourvu que, pendant l'an et jour, il ait fait constater la nature et l'étendue de sa créance. (Jourdain *et* Miville, *Cour d'Appel, Québec*, 30 juillet 1827)..... 249

PRIVILÈGE. Une personne qui avance des deniers pour faire des billots, a un privilège sur ces billots jusqu'à concurrence de sa créance. (Van Koughnet *et* Maitland *et* al., *Cour d'Appel, Québec*, 24 juillet 1829)... 301

" Une personne qui construit un vaisseau pour une autre a droit de le retenir jusqu'à ce que ses avances soient payées. (Rogerson *et* al. *et* Reid, *Conseil privé*, 14 juillet 1830)..... 330

" :—*Vide* DOUAIRE.

" :— " LOUAGE.

PRIVILÈGE DES MEMBRES DU CONSEIL LÉGISLATIF:—*Vide* CONSEIL LÉGISLATIF.

PRIVILÈGE DES MEMBRES DU PARLEMENT:—*Vide* MEMBRE DU PARLEMENT.

PROCÉDURE. Une action sera déboutée, pour défaut de signature de la requête, par le Demandeur ou un procureur. (Nouchel *et* Greysac, *Prévosté de Québec*, 9 octobre 1737)..... 14

" Le Défendeur doit plaider paiement par une exception péremptoire. (Forbes *vs.* Atkinson, *C. B. R., Québec*, 17 février 1810)..... 75

" Il n'est pas nécessaire, dans une action en dommages pour saisie malicieuse, d'alléguer, dans la déclaration, que l'action où la saisie a eu lieu a été jugée. (Whitfield *et* al., *vs.* Hamilton, *C. B. R., Québec*, 8 avril 1811)..... 127

" Une réponse de la nature d'une exception peut être produite à une exception, sous l'ordonnance 25 George III, ch. II, § 13. (Pacquet *vs.* Gaspard, *C. B. R., Québec*, 20 février 1817)..... 164

" Dans une affaire commerciale, s'il appert que le Demandeur a un associé qui a été partie au contrat et qui n'est pas partie à la poursuite, l'action sera renvoyée, quoique le Demandeur n'ait pas plaidé ce fait. (Pozer *et* al. *et* Clapham, *C. B. R., Québec*, 20 juin 1817)..... 168

" Dans une action en dommages, lorsque les dommages résultent d'un fait, ils doivent être allégués dans la déclaration, mais lorsque les dommages résultent d'une injure la loi les présume, et il n'est pas nécessaire de les alléguer. (Perceval *et* Patersons *et* al., *Cour d'Appel, Québec*, 18 janvier 1828)..... 213

" :—*Vide* ABSENT.

" " BORNAGE.

" " COMMISSAIRES ENQUÊTEURS.

" " INJURE DANS UN PLAIDOYER.

" " PARTIES EN CAUSE.

" " QUALITÉ DES PARTIES.

PROCÈS PAR JURY. La vente d'une cargaison de charbon, par un marchand à un forgeron, est une transaction d'une nature mercantile qui donne doit à un procès par jury, sous l'ordonnance provinciale, 25 Geo. III, ch. II, s. 9 (art. 348 C. P. C.). (Hunt *vs.* Bruce, *C. B. R., Québec*, 9 février 1810)... 53

" Une partie qui succombe dans un procès par jury, et qui prétend que le verdict est contre la preuve, n'a pas droit à un nouveau procès, si elle ne fait pas voir que le verdict est *évidemment* contre la preuve. (Dill *vs.* La Compagnie d'Assurance de *Québec, C. B. R., Québec*, 30 mai 1844)..... 471

" :—*Vide* MATIÈRE COMMERCIALE.

PROCUREUR. Le procureur d'une partie peut être condamné personnellement aux dépens d'une opposition qu'il a fait faire. (Côté *et* Simard, *Con. S., Québec*, 13 février 1750)..... 46

PROHIBITION. Un bref de prohibition peut émaner contre la Cour de Vice-Amirauté, si cette dernière cour prend connaissance d'une cause se rapportant à des faits qui se sont passés *infra corpus comitatus* (*Vide* art. 1235 C.P.C.). (Hamilton *et* al., *vs.* Fraser *et* al., *C. B. R., Québec*, 20 février 1811). 115

PROMESSE DE MARIAGE:—*Vide* PREUVE.

PROPRIÉTÉ. Celui qui coupe du bois sur la propriété d'un autre n'en devient pas propriétaire, et le propriétaire du fonds sur lequel le bois est coupé, a le droit de le revendiquer (art. 434 et s. C. C.). (Ains *et* Deguise, *Prévosté de Québec*, 24 février 1728)..... 3

PUISSANCE PATERNELLE. L'enfant peut être confié au grand-père qui offre de l'élever à ses frais et dépens, et même de le faire instruire dans une maison d'éducation, sans qu'il en coûte rien à l'enfant ni au père, si ce dernier refuse de nourrir, loger et entretenir convenablement l'enfant, sans exiger de lui aucune pension, et sans diminuer ses revenus. (L'art. 243 C. C., dit que l'enfant reste sous l'autorité de ses père et mère jusqu'à sa majorité ou son émancipation). (Normand *et* Marcou, *Prév. de Québec*, 15 mars 1759, et *Con. S.*, 25 avril 1729)..... 5

Q

QUALITÉ DES PARTIES. Une partie peut être condamnée dans la qualité qu'elle a prise dans un acte d'obligation. (Carrière *et* Laverdière, *Prévosté de Québec*, 17 octobre 1736)..... 10

QUASI-DÉLIT :—*Vide* SAISIE-EXÉCUTION.

QUÊTEUR :—*Vide* PAIN BÉNIT.

R

RATIFICATION :—*Vide* EFFET DES CONTRATS.

RÉBELLION A JUSTICE. Celui qui empêche un huissier d'exécuter un jugement du tribunal peut être condamné à une amende, et à des dommages-intérêts. (Normand *et* Clesse *et* al., *Con. S., Québec*, 25 novembre 1737)..... 34

RECEL :—*Vide* COMMUNAUTÉ DE BIENS.

REDDITION DE COMPTE. Une reddition de compte approuvée par un jugement interlocutoire ne peut être ensuite renversée à la demande d'aucune partie dans la cause. (Plenderleath *et* ux.,*et* McGillivray *et* al., *Cour d'Appel, Québec*, 19 novembre 1831)..... 360

REGISTRES DE PAROISSE. Un ministre dissident d'une congrégation protestante, n'a pas droit de tenir des registres de paroisse. (Spratt, *C. B. R., Québec*, 6 octobre 1816)..... 154

" Un ministre d'une congrégation presbytérienne, en union avec l'Église d'Écosse, a droit de tenir des registres. (Clugston, requérant, *C. B. R., Québec*, 15 février 1831)..... 348

RENTE CONSTITUÉE. Le débiteur d'une rente constituée qui ne paye pas les arrérages peut être condamné à rembourser le capital. (Louet *et* Morin, *Con. S., Québec*, 27 novembre 1741)..... 38

" " :—*Vide* CONSTITUT.

RÉPARATIONS :—*Vide* LOUAGE.

RÉPARATION D'HONNEUR :—*Vide* INJURE.

RÉPONSE :—*Vide* PROCÉDURE.

REQUÊTE :—*Vide* PROCÉDURE.

RESILIATION DE BAIL :—*Vide* LOUAGE.

RÉSOLUTION :—*Vide* ATERMOIEMENT.

RESPONSABILITÉ. Le propriétaire d'un animal qui a causé des dommages, et qui en fait l'abandon, sera déchargé des dommages. (Normand *et* Lajoue, *Cons. supérieur, Québec*, 9 septembre 1732)..... 29

" Le père putatif d'un bâtard peut être condamné avant sa naissance à en prendre soin. (Roi *et* St-Louis, *Prévosté de Québec*, 12 décembre 1747)..... 23

" :—*Vide* DOMMAGES.

" " SAISIE-EXÉCUTION.

" " SHÉRIF.

" " VOITURIER.

RETRAIT LIGNAGER. Le retrayant doit offrir les *loyaux coûts*. (Fagot *et* Turpin, *Cons. S., Québec*, 15 février 1745)..... 45

RÉTROACTIVITÉ DES LOIS :—*Vide* APPEL.

" " " " ENREGISTREMENT.

REVENDICATION :—*Vide* VENTE.

RIVIÈRE. Les rivières, navigables ou non, appartiennent à la couronne, pour l'usage du public, et personne n'a le droit de les obstruer, sans un permis de la couronne. (Boissonnault *et* Oliva, *Cour d'Appel, Québec*, 16 novembre 1833)..... 416

RIVIÈRES FLOTTABLES :—*Vide* RIVIÈRES NAVIGABLES.

RIVIÈRES NAVIGABLES. Sont des voies de communication publique, et le propriétaire riverain ne peut rien faire au détriment de cette servitude du public. (Oliva *vs.* Boissonnault, *C. B. R., Québec*, 20 octobre 1832)..... 389

" " La grève des rivières navigables appartient au propriétaire riverain sujet à la servitude du public. (Fournier *vs.* Oliva, *Cour d'Appel, Québec*, 17 novembre 1830)..... 341

RUMB DE VENT. Les terres doivent avoir les rumbs de vent portés par les contrats de concession. (Cette règle naturellement ne s'applique qu'au cas où la prescription n'a pas consacré d'autres droits.) (Peltier, demandeur, *vs.* Peltier, défendeur, *et* Magué *et* al., intervenants, *Prév. de Québec*, 22 octobre 1726)..... 1

S

SAISIE-ARRÊT. Sera annulée si elle dépossède un tiers de ses effets. (Wood *et* Gates *et* al., *Cour d'Appel*, Q. 30 avril 1833) 397

" Un vaisseau chargé et prêt à partir pour la mer peut être saisi et arrêté pour une dette civile qui n'a pas de rapport au vaisseau. (Parent *et* al., *vs.* Grenier, *C. B. R., Québec*, 4 avril 1831.) 352

SAISIE-ARRÊT AVANT JUGEMENT. Peut être annulée, si le bref n'est pas dirigé contre les biens et effets du débiteur, et ne contient pas un ajournement de ce dernier. (Richardson *et* Molson *et* al., *Cour d'Appel, Québec*, 20 novembre 1829) 307

SAISIE-ARRÊT EN MAINS TIERCES. Le tiers-saisi sera déchargé, si la sentence intervenue n'est pas signifiée aux défendeurs. (Il n'est pas nécessaire aujourd'hui de signifier aux défendeurs le jugement maintenant une tiers-saisie). (Corriveau et Levasseur, *Con. S., Québec*, 5 décembre 1735) 31

SAISIE DE MEUBLES :—*Vide* GARDIEN JUDICIAIRE.

SAISIE D'IMMEUBLES. Peut avoir lieu sans que les meubles aient été exécutés, s'il y a consentement des parties. (LeGlisse *et* Trudel, *Prévosté de Québec*, 24 octobre 1758) 28

" " :—*Vide* VENTE PAR LE SHÉRIF.

SAISIE-EXÉCUTION. Un créancier peut se faire subroger à la place d'un créancier saisissant, qui néglige de poursuivre la saisie. (Perrault *et* Charest, *Prévosté de Québec*, 9 septembre 1739) 18

" Est nulle s'il n'y a aucune date dans l'exploit de saisie, et l'huissier sera condamné à rendre les frais de la saisie. (L'article 560 C. P. C. dit que le procès-verbal de saisie de meubles doit *contenir la mention du jour où la saisie est faite, et si c'est avant ou après-midi.* L'art. 1053 C. C., dit que *toute personne est responsable du dommage causé par sa faute à autrui.*) (Canac *et* Gatien, *Prév. de Québec*, 15 mars 1729) 6

" :—*Vide* LOUAGE.

SAISIE-GAGERIE PAR DROIT DE SUITE. Le bailleur qui veut saisir par droit de suite doit démontrer que le locataire n'a pas laissé dans la maison une quantité de meubles suffisante pour répondre de son loyer. (Zeigler *vs.* McMahon, *C. B. R., Montréal*, juillet 1845) 465

SAISIE MALICIEUSE DE PROPRIÉTÉ :—*Vide* PROCÉDURE.

SAISIE RÉELLE. Les commissaires aux saisies réelles étaient tenus d'accepter la charge. (On ne nomme plus maintenant de commissaires aux saisies réelles, mais sous l'article 1823 C. C. on peut faire nommer un séquestre.) (Levasseur *vs.* Bouin dit Dufrêne, *Prévosté de Québec*, 1er juillet 1831)..... 7

SALAIRE :—*Vide* LOUAGE DE SERVICE.

SÉDUCTION :—*Vide* RESPONSABILITÉ.

SENTENCE ARBITRALE :—*Vide* ARBITRAGE.

SÉPARATION DE CORPS volontaire sera annulée. (Coulombe *et* Renaut, *Prévosté de Québec*, 28 janvier 1755)..... 26

SÉQUESTRE :—*Vide* SAISIE RÉELLE.

SERMENT DÉFÉRÉ D'OFFICE :—*Vide* PREUVE.

SERMENT SUPPLÉTOIRE :—*Vide* PREUVE.

SHÉRIF. Ne peut être contraint de rapporter un bref de *fieri facias* avant le jour fixé dans le bref pour le rapport. (Dorval *vs.* L'Espérance, *C. B. R.*, *Québec*, 9 octobre 1811)..... 139

" Est responsable de la perte des effets saisis, s'il n'a pas mis pour leur garde un nombre suffisant de personnes. (McClure *vs.* Shepherd, *C. B. R.*, *Québec*, 20 octobre 1813)..... 151

" Lorsque deux personnes sont nommées shérifs conjoints, ils sont responsables l'un pour l'autre, et peuvent être emprisonnés, si des argents perçus par l'un d'eux ne sont pas payés. (Black *et* al., *vs.* Newton *et* al., *C. B. R.*, *Québec*, 19 avril 1828)..... 267

SOCIÉTÉ. La dissolution d'une société, sans avis particulier aux personnes avec lesquelles elle avait l'habitude de contracter, et sans avis général dans la gazette, ne libère pas les membres de la société des obligations contractées par elle après la dissolution avec des personnes de bonne foi. (Symes *et* Sutherland *et* al., *C. B. R.*, *Québec*, 20 avril 1811)..... 132

" Les biens d'une société ne sont pas responsables pour les dettes des associés individuellement. (Montgomery *et* Gerrard *et* al., *Cour d'Appel*, *Québec*, 17 novembre 1830)..... 342

SOCIÉTÉ PAR ACTIONS. Un actionnaire dans une société par actions, peut intenter une action en reddition de compte contre la corporation, et, dans cette poursuite, contester la validité d'un règlement par le bureau des directeurs. (Keys *vs.* The Quebec Fire Insurance Company, *C. B. R.*, *Québec*, 20 octobre 1830)..... 339

SOLIDARITÉ. Obligation d'un défunt déclarée exécutoire contre ses héritiers solidairement. (Sous l'article 1122 C. C. la divisibilité d'une obligation a son effet à l'égard des héritiers ou représentants légaux qui n'y peuvent être tenus au delà de leur part respective, comme représentant le débiteur. (Lefebvre *et* Blouin, *Prévosté de Québec*, 28 février 1738) 16

STATUTS. Une loi temporaire peut abroger un statut permanent, s'il appert de l'intention de la législature à cet effet. (Chasseur *vs.* Hamel, *C. B. R., Québec*, 20 juin 1828).. 274

" :—*Vide* APPEL.

STATUT DES FRAUDES :—*Vide* PREUVE.

SUBROGATION :—*Vide* SAISIE-EXÉCUTION.

SUBSTITUTION. La jouissance d'un immeuble donné par un père à son fils, à la charge de substitution en faveur des enfants de ce dernier, et à la condition que le fils jouira de l'immeuble pour sa provision alimentaire et la subsistance et l'éducation de sa famille, peut être saisie et vendue à la poursuite de sa femme, sur un jugement en séparation de corps, le condamnant à lui payer une pension, pour la partie des revenus de cet immeuble qui excède ce qu'il faut au fils et aux autres membres de sa famille pour leur subsistance. Ce qui sera constaté par experts. (*Cour d'Appel*, 10 mars 1841)..... 454

SUCCESSION VACANTE :— *Vide* CURATEUR À LA SUCCESSION VACANTE.

T

TEMOIN. Un notaire peut être contraint à produire la minute d'un contrat pour qu'elle soit soumise à un témoin. (art. 245 C. P. C.) (Leclerc *et* Labrie, *Prév. de Québec*, 22 octobre 1726)..... 2

" La cour peut ordonner que la femme d'une partie soit entendue. (Capellier *et* Petitclaire, *Prévosté de Québec*, 9 août 1737)..... 11

" :—*Vide* PREUVE.

TERME DE PAYEMENT. Le prometteur d'un billet promissoire, payable dans le mois d'octobre, peut être condamné à le payer avant la fin du mois. (Guignière *et* Foucher, *Prévosté de Québec*, 14 octobre 1737)..... 15

TESTAMENT. Le testateur ne peut disposer que de ses propres biens, par son testament. (Viger *et* ux. *vs.* Pothier, *Cour d'Appel, Québec*, 30 avril 1830)..... 319

TESTAMENT. Un testament qui n'est pas conforme au droit français, mais qui serait suffisant pour disposer d'effets mobiliers en *Angleterre*, peut n'être pas suffisant pour disposer d'immeubles en *Canada*. (Meiklejohn *et* Le Procureur général du Bas-Canada *et* al., *Conseil privé*, 21 juin 1834)..... 291

" La déclaration du roi de France qui exige une autorisation pour l'érection d'une corporation de mainmorte, est abrogée par le statut 41 Geo. III, ch. XVII, quant à ce qui concerne *l'Institution royale pour l'avancement des sciences*. (Desrivières *et* Richardson *et* al., *Cour d'Appel, Québec*, 29 avril 1826)..... 217

" Le testateur ne peut léguer que ses propres biens par testament. (Benoit dit Marquet *et* ux., *vs.* Marcile)..... 484

TESTAMENT OLOGRAPHE, léguant des immeubles, doit être écrit en entier de la main du testateur, et signé par lui. (Caldwell *et* Le Procureur général, *Cour d'Appel, Québec*, 30 juillet 1828)..... 284

" " Ne peut être retenu par le notaire qui le trouve dans les papiers du défunt, mais il doit être produit pour être prouvé. (Grant *et* al., *C. B. R., Québec*, 19 octobre 1811.) 140

TIERS-SAISI. Il sera ordonné au tiers-saisi qui doit le montant d'un billet promissoire de conserver entre ses mains, le montant du billet jusqu'à ce que délivrance en soit ordonnée avec celui qui est porteur du billet (les billets, sous l'article 565 C.P.C. doivent être saisis par saisie-exécution.) (Lefebvre *et* Castillon *et* Lafontaine, tiers-saisi, *Prévosté de Québec*, 13 août 1737)..... 12

TIERS-SAISIE :—*Vide* BILLET PROMISSOIRE.

" " :— " GAGE.

TRIBUNAL :—*Vide* ASSURANCE.

TUTELLE. Le tuteur est tenu d'accepter. (Voyer *et* al., *et* Dalbec, *Prév. de Québec*, 13 mars 1742)..... 21

" Sera déclarée nulle, si le tuteur n'a pas été appelé à l'assemblée, et s'il a six enfants vivants. (Valin *et* Delorme, *Con. S., Québec*, 19 novembre 1742)..... 40

" Le subrogé tuteur des enfants d'un premier lit, n'est pas obligé d'accepter la tutelle de ceux du second lit. (Gratis et Michelon, *Cons. supérieur, Québec*, 9 août 1728)..... 29

" :—*Vide* TUTEUR.

TUTEUR. Ordre donné à un tuteur de prendre qualité pour ses mineurs, soit d'héritier pur et simple de leur père, ou d'héritier sous bénéfice d'inventaire. (L'acceptation, sous l'article 301 C. C., n'a lieu que sous bénéfice d'inventaire.) (Prevost *et* Cédillot, *Prévosté de Québec*, 11 février 1738) 16

" Peut refuser une tutelle s'il a cinq enfants vivants. (Fornel *et* Lanouillier de Boiscler, *Con. S., Québec*, 22 février 1740) 35

" :—*Vide* INVENTAIRE.

U

USUFRUITIER. N'est pas tenu de donner caution. (Par l'art. 404 C. C. l'usufruitier doit donner caution de jouir en bon père de famille, si l'acte constitutif ne l'en dispense.) (Boissel *et* al. *et* Dufresne, *Con. S., Québec*, 10 avril 1756) 51

V

VAISSEAU. Le propriétaire d'un vaisseau peut poursuivre pour recouvrer des deniers qui ont été payés illégalement par le maître à des officiers de douane. (Price *vs.* Perceval, *C. B. R., Québec*, 18 avril 1825) 204

" :—*Vide* PRIVILÈGE.

" " SAISIE-ARRÊT.

VAISSEAU ENREGISTRÉ :—*Vide* VENTE DE VAISSEAUX.

VENTE. Il n'y a pas d'action pour une dette de cabaret. (Rouillard *et* Déchamp, *Prévosté de Québec*, 15 mai 1748) 25

" Le vendeur peut être condamné à purger l'immeuble vendu des hypothèques qui le grèvent. (Duprac *et* Girard, *Con. S., Québec*, 8 avril 1737) 32

" L'acheteur de marchandises doit les examiner sans délai, pour s'assurer si elles sont conformes aux conventions. (Dezaunier *et* Dugard, *Con. S., Québec*, 3 août 1747) 43

" Si la chose vendue est détruite par accident, avant la livraison, la perte est pour l'acheteur. (McDouall *vs.* Fraser, *C. B. R., Québec*, 19 octobre 1816) 162

" Une marchandise importée de l'étranger est censée délivrée au consignataire, lorsqu'elle est mise sur le quai, et est alors à ses risques, pourvu qu'avis lui en ait été donné. (Rivers *vs.* Duncan, *C. B. R., Québec*, 19 octobre 1819) 176

" Dans une vente au comptant, le vendeur a le droit de revendiquer la chose vendue, si l'acheteur ne paye pas. (Moor *et* al., *vs.* Dyke *et* al., *Cour d'Appel, Québec*, 30 avril 1833) 399

VENTE. Le vendeur n'est pas responsable de la perte d'une partie des marchandises livrées, lorsque l'acheteur a laissé s'écouler plusieurs mois sans les réclamer. (Swinburne *vs.* Massue *et* al., *Cour d'Appel, Québec*, 28 avril 1834).... 419

" Le vendeur est tenu de garantir que la chose vendue est propre à l'usage auquel on l'a destinée, et, si cette chose n'est pas propre à cet usage, au temps où on veut s'en servir, il y a lieu à l'action rédhibitoire, quand même cette chose deviendrait ensuite propre à cet usage. La vente d'une quantité d'huile pour la lumière, et qui ne brûle pas lors de la vente, mais qui, plus tard, en reposant, peut devenir propre à cet usage, peut être annulée. Le vice de la chose vendue dont le vendeur n'est pas tenu doit être apparent et facile à découvrir. Il n'y a que la prescription qui puisse éteindre le droit d'action rédhibitoire, et on doit décider suivant les circonstances si l'action a été intentée dans un temps convenable. (Footner *vs.* Heath, *C. B. R., Montréal*, juillet 1845)..... 462

" :—*Vide* EFFET DES CONTRATS.

VENTE DE VAISSEAUX. Le vendeur doit procurer à l'acheteur un titre de la propriété, conformément aux lois sur l'enregistrement des vaisseaux. (Burns *vs.* Hart, *C. B. R., Québec*, 29 février 1810)..... 92

VENTE PAR LE SHÉRIF. Lorsque les enchères sont suspendues, et qu'il n'y a pas d'adjudication par le shérif, le dernier enchérisseur ne devient que l'acquéreur de l'immeuble saisi et offert en vente. (Baker *vs.* Young *et* al., *C. B. R., Québec*, 16 février 1810)..... 66

" " " :—*Vide* OPPOSITION A FIN DE CHARGE.

VÉRIFICATION D'ÉCRITURES :—*Vide* PREUVE.

VICE-AMIRAUTÉ. La Cour du Banc du Roi n'a pas juridiction sur le juge de la Cour de Vice-Amirauté, dans une action pour recouvrer de lui des honoraires d'office qu'il aurait perçus. Le droit de juge de la Cour de Vice-Amirauté de percevoir des honoraires est d'un usage immémorial. (Wilson *vs.* Kerr, *C. B. R., Québec*, 9 décembre 1828)..... 341

VOITURIER. Le voiturier qui ne livre pas les marchandises qu'il a transportées en bon état, est tenu de prouver, si c'est sa prétention, que ces marchandises lui ont été livrées en mauvais ordre. (Hart *vs.* Jones *et* al., *Cour d'Appel, Québec*, 20 novembre 1824)..... 422

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